EXHIBIT A

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of		
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
Amendment of the Commission's Rules	)	**RM-11293**
and Policies Governing Pole Attachments	)	
	)	**RM-11303**
	)	

To: The Commission

COMMENTS
OF THE
COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
Kansas City Power and Light
National Grid
NSTAR

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SUMMARY

Allegheny Power, Baltimore Gas and Electric, Dayton Power & Light, FirstEnergy, Kansas City Power & Light, National Grid, and NSTAR are concerned that the Commission's NPRM may exacerbate an already troubling pole attachment and joint use regulatory environment and jeopardize the safe and efficient operation of the nation's electric utility distribution systems. Although promoting the deployment of cable, telecommunications and broadband services is a worthy goal, it must not compromise safety or diminish electric system reliability and should not occur at the expense of electric utilities and their ratepayers.

Poles and conduit are the backbone of electric utility systems. While the electric distribution network is a cheap and convenient vehicle for cable and other communications companies to use as a platform for deploying their own services, by far its primary function is to support the safe and efficient delivery of electric services to consumers across the country.

Rates. The electric utility industry already unfairly subsidizes cable and telecom attachers. Attachers avoid all costs necessary to construct their own pole distribution systems, and they pay a disproportionately small percentage of utility expenses necessary to construct and operate one on their behalf. Many "hidden" costs attributable to attachers are not recoverable by the utilities. The Commission's current pole attachment rate methodology is akin to the utility paying full price for a car while attachers remain free to climb on board and chip in a small percentage annually for gas and other expenses. Not only that, but the car itself (which must be bigger, faster and stronger to accommodate the added passengers) is considerably more expensive than the car that the utility would have bought for its own purposes.

Under the FCC's current rate formula, cable companies are required to pay only a miniscule portion of the costs associated with common space on a pole (inappropriately termed "unusable" space) that is necessary to stabilize the pole, to elevate all attachments, and to provide the 40 inches of "communications worker safety zone" space that would not be needed but for communications attachments. All aerial attachments benefit from the common space, yet the costs are not equitably shared.

The telecom rate offers some improvement (since it allocates 2/3 of most common space costs equally) but similarly fails to reflect the value of the pole distribution system to telecom attachers or the significant costs that they avoid by not being required to build their own pole distribution systems.

To the extent government mandated subsidies were appropriate to jump-start the cable or telecom industries in the early days of pole attachments, those days are long gone. Yet Comcast, Time Warner Telecom and other media giants continue to get access to the most basic component of "their" pole distribution systems for an artificially low, government-mandated fee that unfairly discriminates against the nation's electric utilities and their consumers.

The Coalition supports the Commission's efforts to create a single, broadband rate, but, as Chairman Kevin J. Martin noted, electric consumers should not be subsidizing broadband companies. The Coalition's proposed rate for broadband attachers (adopted by the City of Seattle and affirmed by the Washington State courts) eliminates the historic subsidy of cable and telecom companies by requiring that costs associated with 100% of the common space on poles (including the "communications worker safety zone" space) be shared equally among all attachers. The broadband rate should presumptively be applied to all attachments.

Joint Use. Joint Use, unlike third party pole attachments, involves arrangements between two pole owning entities -- electric utilities and Incumbent Local Exchange Carriers ("ILECs"). ILECs are different than typical attachers. For almost 100 years, electric utilities and ILECs have worked together to construct a mutually beneficial, multi-million mile aerial pole distribution system that is both safe and efficient.

USTelecom, the national ILEC trade association, argues that ILECs have become the "victims" of abuse by electric utilities under Joint Use. Far from being victimized, however, ILECs have exploited the Joint Use process. ILECs have abandoned their traditional joint use responsibilities and required electric utilities to install the vast majority of new poles, obtain necessary permits, provide emergency responses, police the system and ensure safe operations. The ILECs' relatively recent disassociation from Joint Use, not any "abuse of market power" by electric utilities, is the reason why utilities have come to own a higher percentage of Joint Use poles.

USTelecom's claim that the Pole Attachment Act mandates "just and reasonable" rates for ILECs attaching to electric utility poles ignores explicit statutory language, as well as 10 years of history at the FCC and in the courts. The ILECs themselves only recently "discovered" their claimed loophole. While USTelecom would guarantee for ILECs certain regulated rates, terms and conditions governing ILEC use of electric utility poles, it would offer no parallel rights for electric utilities that remain dependent on access to ILEC-owned poles. Stripped of similar leverage, electric utilities would be left to fend for themselves.

Penalties. As cable companies, CLECs and ILECs compete for customers, speed to market and cutting costs are driving the rollout of new communications services. Unfortunately, electric system safety and reliability often has taken a back seat.

As a result, Coalition members are faced with huge numbers of unauthorized attachments, countless NESC clearance violations, improper pole guying, ungrounded messenger wires, excessive overlashing, improper use of boxing and extension arms, improper installation of equipment, improper hole drilling, the displacement and damage of utility equipment, customer outages, and a host of additional safety violations and poor construction practices by attachers.

The FCC's existing rules do little to assist utilities in addressing these problems. The Commission's unauthorized attachment rulings actually *encourage* unauthorized attachments, since the worst that can happen is that unauthorized attachers will be required to pay rentals that they should have been paying all along – if they get caught.

The Coalition recommends the following penalties to combat the huge numbers of unauthorized attachments, which include adjustments to encourage attachers to comply with pole owner audits:

- $100 per unauthorized attachment plus 5 years annual rental if an unauthorized attachment is found and the attacher has not participated in a required audit;
- $50 per unauthorized attachment plus 5 years annual rental if the attacher does participate in the audit or identifies the unauthorized attachment on its own.

To combat safety violations, the Commission should require attachers to comply with industry standard safety codes as well as the utilities' own safety and operational requirements. To promote compliance, the Commission should clarify that pole owners may impose penalties for safety violations in the amount of $200 per violation.

The Commission also should make clear that utility pole owners may charge "Imposition Costs" that reflect the cost of materials and equipment, fully loaded direct and indirect labor, engineering, supervision and overhead, plus an additional 50% when they are required to do work that attachers have failed to do themselves.

Fibertech. Fibertech's proposed rules go to the heart of electric utility operations and are based on the concept that attachers, not utilities, know best how to construct, operate, manage and maintain electric distribution systems. This notion is as dangerous as it is far fetched. Decisions regarding the safe construction and reliable operation of electric utility systems must be made by individual utilities based on their experience and best judgment, not by attachers.

For example, Fibertech's proposals regarding boxing, extension arms and drop poles raise significant operational concerns, and its proposal for unfettered access to manholes and conduit fails to make the very important distinction between relatively safe non-energized ILEC underground facilities and highly energized electric underground facilities that require significant safeguards.

The artificial deadlines proposed by Fibertech for field surveys and make ready work would force utility personnel to perform communications attacher work before the utility's own electric work. Allowing attachers to hire outside contractors is no solution and would raise a host of additional concerns regarding safety, quality of work, work priorities and labor relations.

The Coalition agrees wholeheartedly with Chairman Martin, when he states that the safety and reliability of critical electric infrastructure is of paramount concern in this proceeding. Pole Attachments are a deadly serious, critically important matter, with broad implications for the reliability of the nation's electric grid and the personal safety of those who work on or near poles, attachments and energized lines. The Commission's regulations should reflect this concern.

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COMMENTS

Allegheny Power, Baltimore Gas and Electric, Dayton Power & Light, FirstEnergy, Kansas City Power & Light, National Grid, and NSTAR (collectively referred to herein as "the Coalition of Concerned Utilities" or "Coalition"), by their counsel and pursuant to Section 1.415 of the rules and regulations of the Federal Communications Commission's ("FCC" or "Commission"), 47 C.F.R. § 1.415, hereby submit these Comments in response to the Notice of Proposed Rulemaking ("NPRM") released in this proceeding on February 6, 2008.[1]

The Coalition is concerned that the Commission's NPRM may exacerbate an already troubling pole attachment and joint use regulatory environment and jeopardize the safe and efficient operation of the nation's electric utility distribution systems. The Commission is urged to exercise caution in modifying an already attacher-friendly pole attachment regulatory regime in an attempt to foster the continued deployment of cable, telecommunications and broadband services via the nation's electric utility distribution poles.

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[1] Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, 73 Fed. Reg. 6879 (Feb. 6, 2008)(hereinafter, "NPRM").

I. FOREWORD

Electricity is one of the great "givens" of modern American society. Its presence is assumed. It drives virtually all of the key components of modern life, yet most people outside of the electric utility industry do not give it a passing thought until it is unavailable. Electricity is something that's noticed only by its absence – when service is disrupted, and our water, telecommunications, transportation and banking systems grind to a halt, and our homes, our businesses, indeed, our daily lives, shut down.[2] At that point the unavailability of electric service is keenly felt by all.

The safe and efficient production and delivery of electric utility services is dependent upon a highly complex, interrelated series of processes. Millions of distribution poles that are constructed, owned and maintained by electric utilities to deliver service to "the last mile" to consumers are also used by numerous "guests" -- cable, telecommunications, broadband and other attachers -- to deploy their own services to their own customers.

The Coalition agrees wholeheartedly with Chairman Kevin J. Martin, when he states that the safety and reliability of critical electric infrastructure is of paramount concern in this proceeding.[3] The regulation of Pole Attachments is a critically important function entrusted to the Commission by Congress, and it deserves the Commission's full attention and expertise. In its decision making process, the Commission should carefully weigh the public's interest in

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[2] Jason Makansi, Lights Out: The Electricity Crisis, the Global Economy and What it Means to You, (John Wiley & Sons, Inc. 2007).

[3] Statement of Chairman Kevin J. Martin, *Re: Implementation of Section 224 of the Act; Amendment to the Commission's Rules and Policies Governing Pole Attachments*, released Nov. 20, 2007, WC Docket No. 07-245, RM-11293, RM-11303 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-187A2.pdf)(last visited March 3, 2008)("It is ... important that pole owners be properly compensated for the use of their infrastructure by others. I do not think electric consumers should be subsidizing any broadband companies. Establishing parity should not come at the expense of pole owners or electric consumers. ... The safety and reliability of critical electric infrastructure is a paramount concern. Our work on telecommunications reliability should not come at the expense of other public safety systems.").

receiving safe and reliable electric services. Pole attachment regulation should not be viewed as an easy means to subsidize broadband deployment through a "few relatively simple tweaks" to the Commission's rules.[4]

Pole Attachments are a deadly serious, critically important matter, with broad implications for the reliability of the nation's electric grid and the personal safety of those who work on or near poles, attachments and energized lines.[5] The Coalition urges the Commission to review carefully its current Pole Attachment and Joint Use rules and to exercise caution in adopting changes that could adversely affect the electric utility industry.

While the electric utility distribution network is a cheap and convenient vehicle for cable and other communications companies to use as a platform for deploying their own services, by far its primary function is to support the safe and efficient distribution of electricity to consumers across the country. The electric utility industry, including its owners and consumers, should not be required as a matter of public policy to underwrite the deployment of broadband or other services for the benefit of the nation's communications companies and their subscribers.

Pole owners should be properly compensated for the use of their infrastructure by others.[6] As the Chairman notes, establishing parity in attachment rates should not come at the expense of

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[4] Statement of Commissioner Michael J. Copps, *Re: Implementation of Section 224 of the Act; Amendment to the Commission's Rules and Policies Governing Pole Attachments*, released Nov. 20, 2007, WC Docket No. 07-245, RM-11293, RM-11303 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-187A3.pdf)(last visited March 3, 2008).

[5] Ask Andy Blood, a 25-year-old former lineman for Xcel Energy. Mr. Blood was paralyzed following the collapse of a rotted pole owned by Qwest Communications. He was awarded $39 million for his injuries. The judgment subsequently was increased by a Denver District Court to a total award to $84 million, based upon Qwest's failure to address its pole maintenance and inspection problem even after it was sued. Bob Mook, *Jury awards Lineman $39M in Qwest lawsuit*, Denver Business Journal, May 24, 2007 (available at http://denver.bizjournals.com/denver/stories/2007/05/21/daily55.html)(last visited March 3, 2008).

[6] Statement of Chairman Kevin J. Martin, *supra* Note 3.

pole owners or electric consumers, who should not be subsidizing broadband companies as a matter of national policy.

Pole attachment rates should be fair to all, not biased for the unilateral benefit of attachers. Communications companies – oftentimes huge, rapidly-growing, for-profit companies – should not be the beneficiaries of continued government hand-outs. They should be required to pay their full and fair share for the benefits they receive from attaching to electric utility industry poles. Most importantly, they should be required to install, maintain and operate their attachments in accordance with applicable engineering and safety codes and electric utility standards.

II. INTRODUCTION

The Coalition of Concerned Utilities is comprised of a diverse group of electric utility companies in terms of size, attacher relationships and operational characteristics. The following is a brief description of the Coalition members.

Allegheny Power provides electric service to approximately 1.6 million customers throughout Pennsylvania, West Virginia, Virginia and Maryland. Allegheny Power operates through three regulated utilities doing business as West Penn Power Company, Monongahela Power Company, and The Potomac Edison Company. Allegheny Power altogether owns in whole or in part 1,600,000 electric distribution poles.[7]

[7] http://www.alleghenypower.com/ (last visited February 20, 2008).

Baltimore Gas and Electric provides electricity to more than 1.2 million customers throughout eight Maryland counties. Baltimore Gas and Electric jointly owns more than 382,089 electric distribution poles covering 2,300 square miles.[8]

The Dayton Power & Light Company provides electricity to approximately 500,000 customers in 24 counties throughout West Central Ohio. Dayton Power & Light owns and maintains 322,629 electric distribution poles.[9]

FirstEnergy provides electric service to 4.5 million customers throughout 36,100 square miles of Ohio, Pennsylvania and New Jersey.[10] FirstEnergy provides this service to its customers through seven electric utility operating companies.[11] FirstEnergy owns, in whole or in part, 2,008,642 million utility poles.[12]

Kansas City Power & Light serves 500,000 customers in a 4,600 square mile area covering western Missouri and eastern Kansas. Kansas City Power & Light is a wholly-owned subsidiary of Great Plains Energy Incorporated and owns 271,271 electric distribution poles.[13]

National Grid provides electricity to approximately 3.4 million customers across the Northeast U.S. (serving New York, Massachusetts, Rhode Island and New Hampshire). National Grid owns, in whole or in part, 2,303,700 electric distribution poles.[14]

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[8] http://www.bge.com/portal/site/bge/ (last visited February 20, 2008).

[9] http://www.waytogo.com/ (last visited February 20, 2008).

[10] http://www.firstenergycorp.com/index.html (last visited February 20, 2008).

[11] FirstEnergy's operating companies are Jersey Central Power and Light, Metropolitan Edison, Ohio Edison, Pennsylvania Electric Company, Pennsylvania Power Company, Cleveland Electric Illuminating Company, and Toledo Edison.

[12] These poles are owned and maintained by FirstEnergy subsidiaries. Penelec owns 496,104 poles; Met-Ed owns 340,239 poles; JCP&L owns 510,000 poles; The Illuminating Company owns 407,299 poles; Ohio Edison owns 751,900 poles; and Toledo Edison owns 255,000 poles.

[13] http://www.kcpl.com/ (last visited February 20, 2008).

NSTAR provides electricity to approximately 1.1 million customers throughout Massachusetts. NSTAR provides electricity to an area of 1,702 square miles. NSTAR owns, in whole or in part, 388,000 electric distribution poles.[15]

Altogether, the Coalition of Concerned Utilities serves approximately 12,800,000 electric customers and owns, in whole or in part, 7,274,242 electric distribution poles.

III. COMMENTS

A. THE BROADBAND RATE SHOULD ELIMINATE UNWARRANTED SUBSIDIES

The Commission seeks comment on the extent to which its current cable rate formula, which does not include a separate allocation for "unusable" space, results in a subsidized rate and, if so, whether cable operators should continue to receive such subsidized rates at the expense of electric consumers.[16] The Commission also asks whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service.[17]

As explained below, the cable rate formula results in a grossly subsidized rate, primarily because it requires cable companies to pay only a negligible portion of the costs associated with the common space on the pole, even though the common space and associated benefits are shared equally by all attaching entities. For this and other reasons, the cable rate does not remotely reflect an equitable sharing of actual pole ownership costs, the value of the pole distribution

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[14] http://www.nationalgridus.com/ (last visited February 20, 2008)(Former National Grid subsidiaries Granite State Electric, Massachusetts Electric, Nantucket Electric, Narragansett Electric, and Niagara Mohawk Power Company now all operate under the name National Grid USA).

[15] http://www.nstaronline.com/residential/ (last visited February 20, 2008).

[16] NPRM at ¶ 8.

[17] *Id.*

system to cable attachers, or the costs that the attachers otherwise would have incurred in constructing their own pole distribution systems (i.e., avoided costs). The problem is compounded when cable operators offer additional services.

The subsidy problem is not unique to cable operators. The telecom rate paid by Competitive Local Exchange Carriers ("CLECs") also fails to allocate a reasonable share of common space costs and consequently does not come close to reflecting the value of the pole distribution system to telecom attachers or their avoided cost benefits.

1. The Commission's Current Pole Attachment Rate Formulas Result in Unjustified Subsidies of Cable and Telephone Companies at the Expense of Electric Utility Ratepayers

Cable and CLEC attachers alike currently bear none of the burden or expense of constructing their own pole distribution systems. Instead, they rely on electric utilities or the incumbent local exchange carriers ("ILEC") to construct and maintain "their" distribution support systems for them. Furthermore, the fact that electric utilities must plan for the possibility that attachers will be seeking access to the utilities' distribution systems in the future significantly increases electric utility up-front costs of building the systems. As a result, the Commission's current pole attachment rate methodology is akin to the utility paying full price for a car (one that is considerably more expensive than the car the utility would need for its own purposes) while attachers climb on board and chip in some small percentage annually for gas and other expenses.

The FCC employs two different pole attachment rental formulas: "cable-only" and "telecom."[18] The cable-only formula applies to cable television operators providing only cable service. The telecom formula applies to all providers of telecommunications services except for

[18] NPRM at ¶ 7. *See also*, 47 C.F.R. 1409.

incumbent local exchange carriers (ILECs).[19] To the extent that cable operators provide telecommunications services, they become subject to the telecom rate.

The cable-only and telecom formulas are expressed as follows:

MAXIMUM RATE (Cable-Only)	=	FCC Cable Rate Space Allocation Percentage	x	Net Cost of a Bare Pole	x	Carrying Charge Rate
MAXIMUM RATE (Telecom)	=	FCC Telecom Rate Space Allocation Percentage	x	Net Cost of a Bare Pole	x	Carrying Charge Rate

Under both of these formulas, the utility's annual cost of owning and operating its poles is calculated in the same manner: by multiplying the "Net Cost of a Bare Pole" by the "Carrying Charge Rate." That annual cost figure is then multiplied by the percentage of those costs that are allocated to the attacher (the "Space Allocation Percentage"). The only difference between the FCC Cable Rate formula and FCC Telecom Rate formula is how the Space Allocation Percentage is calculated.

The Commission's existing two rate formulas do not include enough FERC Form 1 accounts in the Net Cost of a Bare Pole and Carrying Charges portions of the formula to fully compensate electric utilities for pole attachments. For example, no costs are allowed from Account 590 (maintenance supervision and engineering (Major only)), even though such supervision and engineering is a vital part of administering pole attachments. Similarly, costs are excluded from Accounts 360 (land and land rights); 365 (overhead conductors and devices); 367 (underground conductors and devices); 368 (line transformers); 369 (services); 389-399 (General Plant); 580 (operation and supervision); 583 (overhead line expenses (Major only)); 584

[19] As discussed later, ILEC rates are negotiated, not regulated.

(underground line expenses (Major only)); 584 (operation of underground lines); 588 (miscellaneous distribution operation expenses); 590 (maintenance supervision and engineering-Major only); and 598 (maintenance of miscellaneous distribution plant). All of these accounts include costs attributable to administering pole attachments, yet electric utilities are incapable of recovering them under FCC rules.

With respect to costs associated with the limited number of FERC Accounts that the Commission's formulas do permit utilities to recover, the existing Cable and Telecom rate formulas allocate far too few of those costs to communications attachers. While the allocation of costs in the existing FCC Cable and Telecom formulas varies, neither rate calculation recognizes that the service these attachers need and demand is an amount of space that is suspended 18 feet or higher in the air. Both formulas give the attacher a deeply subsidized rate for the six feet of pole that is buried in the ground and the first 18 feet or so of pole that is above ground. It is a fiction that the attacher is only "using" a small amount of space 18 feet up – the attacher in fact is sharing the use of the entire pole up to the point of the attachment.

a. FCC Cable Rate Space Allocation Percentage

In the FCC Cable Rate formula, the space allocation (or "responsibility") percentage is determined by taking the space occupied by the attachment and dividing that figure by the total amount of space on the pole that is deemed to be "usable" for attachment purposes. This calculation is expressed as follows:

$$\textbf{FCC CABLE RATE SPACE ALLOCATION PERCENTAGE} = \frac{\text{Space Occupied}}{\text{Total Usable Space}}$$

The FCC presumes that the space occupied by an attachment is one foot, and that the total amount of usable space on an average 37.5 foot pole is 13.5 feet. Using these rebuttable presumptions, the cable-only responsibility percentage equals 1/13.5, or 7.4%. Accordingly, the FCC's Cable Rate formula requires cable companies to pay only 7.4% of a utility's total annual pole costs.[20]

In other words, the pole attachment rate that cable attachers are required to pay reflects only a pro rata share of costs for the entire pole that is based on their portion of the usable space. As noted above, about 24 feet of the pole below where the attacher may be attached is excluded from the definition of usable space. Although cable attachers benefit equally with electric utilities from that 24 feet, they still pay only the reduced "usable space" ratio of the costs for the entire pole.

A formula that correctly recognizes the value provided to cable attachers would share the costs equally between attachers and the electric utility for the space up to the first attachment, recognizing that each occupant on the pole uses that portion of the pole in order to get its attachments sufficiently high off the ground. A proportionate share of the "communication worker safety zone"[21] ("safety space") that is required to allow unqualified telecommunications personnel to work safely near energized electric facilities also should be assigned to attachers. The communication worker safety space is not necessary when only electric facilities are attached. This safety space is required only because of the presence of telecommunication attachments and unqualified telecommunications workers near energized portions of the pole.

[20] *See* NPRM at ¶9; *see also*, 47 U.S.C. § 224(d).

b. FCC Telecom Rate Space Allocation Percentage

Unlike cable companies, telecommunications attachers are required to pay a higher – but still artificially low –share of the costs related to the portion of the pole outside of the usable space. Pursuant to the FCC Telecom Rate formula, the total annual pole costs are divided into usable space and "unusable" space portions, based on the percentage of the total pole height (presumed to average 37.5 feet) that the usable space (presumed to be13.5 feet) and unusable space (presumed to be 24 feet) occupy. The costs assigned to the usable and unusable space portions of the pole are then allocated to the attachers, but different allocations are used for the usable portion than for the unusable portion.[22]

The Commission's use of the term "unusable space," however, is a misnomer that seriously distorts pole attachment rate calculations for the benefit of telecom attachers. The Pole Attachment Act does not use the term "unusable space;" it refers to "space other than the usable space."[23] In fact, the so-called unusable space is not unusable at all. It consists of *common space* that is used to support all attachments. It equally benefits utility and non-utility attachments alike. It is no more "unusable" to cable and telecom attachers than it is to the electric utility pole owner itself. And in fact it is often used by both companies for vertical runs of cable and other equipment. Conversely, it is no more "usable" to electric utilities than to cable and telecom attachers, yet electric utilities are required to bear a disproportionate share of the costs to provide both "usable" and "unusable" space for the attachers' benefit.

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[21] The NESC calls the 40-inch safety space the "communication worker safety zone," reflecting its sole purpose to protect communication workers. *See* NESC § 238.E.

[22] *See* NPRM at ¶12; *see also*, 47 U.S.C. § 224(e).

[23] 47 U.S.C. § 224 (e)(2).

As with cable attachers, under the Commission's rules the costs associated with the usable space portion of the pole are allocated to telecom attachers based on the percentage of the usable space (presumed to be 1/13.5, or 7.4%) used by the attacher. Unlike the situation with cable attachers, however, the costs associated with the common space portion of the pole are allocated differently for telecom attachers.

Despite a shared benefit by all, one-third of the common space costs are excluded from rate calculations for telecom attachers and allocated exclusively to the utility pole owner. The remaining two-thirds of the common space costs are allocated equally among all attachers, including the utility pole owner. This current rate methodology in effect "double counts" the pole owner and disproportionately allocates common space costs. Combining these allocations for usable and common space (called "unusable" space by the FCC), the formula for determining the responsibility percentage for telecom attachers is:

$$\textbf{FCC TELECOM RATE SPACE ALLOCATION PERCENTAGE} = \frac{\text{Space Occupied} + \left(2/3 \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}}$$

As this telecom rate formula demonstrates, the greater the number of attaching entities on the pole, the lower the rate that may be charged to each regulated attacher. As mentioned, the FCC requires utility pole owners to count themselves among the attaching entities for purposes of determining the number of attaching entities. In making this calculation, the FCC also imposes several presumptions, including inaccurate and misleading presumptions related to the number of attachers.

c. Telecom Attachers Are Further Subsidized by Flawed Presumptions Regarding the Number of Attaching Entities.

Should the utility not possess information sufficient in the FCC's judgment to verify the number of attachers on its poles, the FCC requires the utility to assume that there are five (5) attachers in "urbanized" areas (greater than 50,000 population) and three (3) attachers in "non-urbanized" areas (less than 50,000 population). In its NPRM, the Commission seeks information concerning the actual average number of attachments per pole.[24]

Establishing the average number of attaching entities per pole is often the most contentious aspect of the telecom rate calculation, because the FCC's guidance on how to calculate this number has been subject to differing interpretations. The problem for utility pole owners and attachers alike is that the distinction between "urbanized" and "non-urbanized" is unworkable in practice. Standard plant accounting (Uniform Code of Accounts) does not recognize "urbanized" or "non-urbanized" designation, and utility pole owners generally do not maintain records sufficient to determine the average number of attaching entities in "urbanized" and "non-urbanized" areas as determined by the U.S. Census.[25]

Few electric service territories fall neatly into one category or the other, and it is unclear to what extent the utilities' or attachers' service territories must overlap or be encircled by "urbanized" and "non-urbanized" areas. It is often impossible from a practical perspective to determine where an "urbanized" area ends and a "non-urbanized" area begins. Without the ability to distinguish between "urbanized" and "non-urbanized" areas and calculate the average

[24] NPRM at ¶ 5.

[25] 47 C.F.R. § 1.417.

numbers of attaching entities for each, many utilities by necessity have been forced to use five as the presumed number of attaching entities in their rate calculations.

There are a host of other unanswered questions regarding the "urbanized/non-urbanized" distinction. For example, does it apply to the utility's entire service territory or only to the poles at issue? What if the utility serves both urbanized and non-urbanized areas, but the attacher seeks to place attachments only in an urbanized area or a non-urbanized area? To what extent should the attachers' geographic service territories be considered? None of these questions is adequately answered by existing Commission decisions.[26]

The FCC's telecom rate is dramatically reduced by the application of the Commission's presumptions, as demonstrated by the chart below that compares the differences between the FCC Cable Rate and Telecom Rates, based on the number of attachers used for purposes of applying the FCC Telecom formula. For purposes of this comparison, the FCC's presumptions relating to space occupied, common space, and pole height were used:

Responsibility Percentages

FCC Cable Rate	7.4%
FCC Telecom Rate (3 attachers)	16.9%
FCC Telecom Rate (5 attachers)	11.2%

Since a presumption of five attaching entities (or even three attaching entities) is not based in reality, it grossly overstates the actual number of attaching entities on utility poles and thereby artificially reduces the Telecom rate. In effect, the presumption of five (5) "phantom"

[26] *See Consolidated Reconsideration Order*, 16 FCC Rcd 12103, at ¶¶ 64-72 (2001); *Teleport Communications Atlanta, Inc. v. Georgia Power Co.*, 17 FCC Rcd. 19859 (2002).

attaching entities causes a further subsidization of attachers by pole owners. All of the added costs associated with these "phantom" attachers are borne by the utility pole owner.

Table 1 below demonstrates the extent to which the Commission's presumptions regarding the number of attachers are overstated *vis-à-vis* members of the Coalition. The chart identifies the number of poles owned in whole or in part by Coalition Members that have *zero* attaching entities other than the electric utility, the number with *one* additional attaching entity, the number with *two* more, *three* more, and so on. As demonstrated, the Commission's presumptions of three attaching entities for "non-urbanized" areas and five attaching entities for "urbanized" areas are unrealistically high.

Table 1
ATTACHING ENTITIES PER POLE

# of Poles owned in whole or in part	Total	BG&E	DP & L	KC P&L	Niagara Mohawk Power (Nat'l Grid)	Ohio Edison & Penn Power*	JCP&L*	The Illuminating Company*	Penelec*	Met-Ed*	Toledo Edison Company*
Total	4,499,221	382,089	322,629	271,271	762,690	751,900	510,000	407,299	496,104	340,239	255,000
Zero Additional Attachers†	1,266,457	51,484	179,059	172,222	54,294	89,210	42,023	274,067	189,795	84,124	130,179
One Additional Attacher†	892,117	99,693	75,592	46,763	135,835	75,190	28,678	126,033	147,767	88,047	68,519
Two Additional Attachers†	1,945,832	217,845	56,460	38,110	534,345	435,000	293,470	10,379	159,337	148,370	52,516
Three Additional Attachers†	388,841	12,401	11,292	10,048	35,050	130,000	157,866	1,507	7,607	19,089	3,981
Four Additional Attachers†	30,303	610	<100	3,295	2,966	20,000	N/A	111	866	2,146	209
Five Additional Attachers†	3,326	56	<100	570	200	2,000	N/A	0	44	355	1
> Five Additional Attachers†	885	TBD	<100	263	0	500	N/A	0	9	12	1

† Other than the electric utility.
* -- Subsidiaries of FirstEnergy.

As is apparent in Table 1, a sizable percentage of poles owned in whole or in part by Coalition Members have *no* additional entities attached besides the electric utility. For KCP&L and two FirstEnergy operating companies (The Illuminating Company, and Toledo Edison), more than one-half of the poles have *no* additional attachers. The number of poles that have more than three attaching entities (including the electric utility) is extremely low. Thirty percent of the poles owned by Jersey Central Power and Light (a FirstEnergy operating company) have more than three attaching entities, but for the remainder of the Coalition members, that figure is five percent or less.

There are several factors that help to explain why the number of attaching entities on poles owned by Coalition Members is far fewer than the three and five attacher presumptions used by the FCC. There is only one cable operator in most communities, and cable service does not extend to all areas reached by electric utilities. ILECs may take different routes than electric utilities or install their facilities underground. And the number of CLEC attachments is far fewer today than the Commission envisioned when its three attacher and five attacher presumptions were established.

Table 2 shows how cable attachments cover far less than the entire electric utility pole plant of Coalition Members, and shows the very small number of CLEC attachments on Coalition Member systems:

Table 2
POLES WITH CABLE AND CLEC ATTACHMENTS

	Allegheny Power	BG&E	DP&L	KCP&L	National Grid	NSTAR	JCP&L*	The Illuminating Company*	Penelec*	Met-Ed*	Toledo Edison Company*	Ohio Edison & Penn Power*
# of Poles owned in whole or in part	900,000[27]	382,089	322,629	271,271	2,303,700	388,000	510,000	407,299	496,104	340,239	255,000	751,900
# of Poles owned with at least 1 cable attacher	400,000	229,809	121,000	72,821	N/A	0	182,250	1,385	203,659	203,162	112,418	526,330
# of Poles owned with at least 1 CLEC attacher	21,000	5,954	1,119	94,077	N/A	0	682	155	14,364	14,635	212	5,000

* -- FirstEnergy Operating Companies.

All utilities have system-wide records of attachments. Rather than separate pole attachment information into "urbanized" and "non-urbanized" areas, however, utilities separate their pole attachment records into other, more useful categories. Utilities often keep their pole attachment records separated by city, county, tax district, zip code, service territory subdivisions, and other ways, as listed below:

Allegheny -	operating company, service center
BGE -	tax district, county, city, zip code
KCP&L -	city, county, utility district
National Grid -	city, village, town
NSTAR -	city
Penelec -	municipality, township, crew area
MetEd -	municipality, township, crew area
Toledo Edison -	zip code
Illuminating Co. -	zip code, municipality

Given the ability of many utilities to determine more accurate counts of attaching entities based upon criteria other than "urbanized" and "non-urbanized," the unworkability the existing "urbanized/non-urbanized" distinction, and the fact that the five attacher and three attacher

[27] Does not include joint-owned poles.

"urbanized/non-urbanized" distinction, and the fact that the five attacher and three attacher estimates for these areas are grossly overstated, the Commission should permit utilities to develop an average number of attaching entities based upon any reasonable, well defined geographic area. Allowing such flexibility would render rate calculations more accurate and help to lessen the subsidy that already exists in the telecom rate.

d. Gigantic Communications Companies Do Not Require or Deserve Subsidies from Electric Utility Ratepayers

Neither the House Report, Senate Report nor Conference Report leading up to enactment of the 1996 Telecommunications Act explains why Congress adopted a lower pole attachment rate for cable-only attachments than for telecom attachments. The House Report, however, did indicate that cable companies were furnished with a low pole attachment rate in 1978 in order "to spur the growth of the cable industry, which in 1978 was in its infancy."[28]

Cable is no longer in its infancy. "CATV" companies have transformed themselves into communications giants, offering not only cable television service, but also video on demand, broadband Internet access and telephone services. Telecom companies, too, have grown and expanded their service offerings. At this late date, it is inappropriate to allow the cable and telephone industries to "piggy back" on electric utility poles without paying a full attachment rate that fairly reflects the benefits they receive (and the costs they save) when they deploy their attachments on someone else's distribution poles.

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[27] Does not include joint-owned poles.

[28] H.R. Rep. No. 104-204, at 91 (1995).

Comcast, the largest cable company in the country, boasts a market capitalization of some $42.5 billion.[29] It has 24.1 million cable customers, 13.2 million Internet access customers and 4.6 million voice customers.[30] The number of Comcast VoIP customers has increased 53% in the last six months alone.[31] The company reported revenue of $25 billion in 2006 and income of $2.53 billion.[32]

Similarly, Verizon is enjoying tremendous profits and growth and does not deserve to have its pole attachment costs subsidized, to the extent that the Commission is considering such subsidization.[33] Verizon Wireline earned revenues of $12.5 billion and operating expenses of $11.3 billion in the fourth quarter of 2007 alone.[34] Verizon Wireline's parent company, Verizon Communications Inc., reported $93.5 billion in total 2007 revenues, up 6% from 2006.[35] Verizon Wireline added 226,000 new FiOS TV and 264,000 new broadband connections in the 4th Quarter of 2007 alone.[36] In January 2008, Verizon enrolled its one millionth FiOS TV customer and provided FiOS internet service to 1.5 million customers.[37] Verizon FiOS TV is currently available in 3.1 million homes and Verizon anticipates that its FiOS TV service will be

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[29] CNN Money, http://money.cnn.com/quote/quote.html?symb=CMCSA&mode=pressrelease, (last visited February 21, 2008).

[30] http://www.comcast.com/corporate/about/pressroom/corporateoverview/corporateoverview.html, (last visited February 21, 2008).

[31] Vonage slips to Comcast in VoIP subscribers, http://www.usatoday.com/tech/products/services/2007-08-09-vonage-loses-voip-subscribers_N.htm (last visited Feb. 20, 2008) (reporting 3 million VoIP subscribers at the end of the 2nd quarter of 2007).

[32] Comcast Corporation Form 10-K for fiscal year ended December 31, 2006, pp. 25-26.

[33] Verizon Caps Successful Year with Strong 4Q Results, http://investor.verizon.com/news/view.aspx?NewsID=885 (last visited Feb. 21, 2008).

[34] Verizon Caps Successful Year With Strong 4Q Results, http://newscenter.verizon.com/press-releases/verizon/2008/verizon-caps-successful-year.html (last visited Feb. 22, 2008).

[35] *Id.*

[36] *Id.*

[37] Verizon Tops 1 Million FiOS TV Customers, http://investor.verizon.com/news/view.aspx?NewsID=886 (last visited Feb. 21, 2008).

available to 15 million households by the end of 2010.[38] This represents an increase of almost 500% in three years.[39]

Not only are these attachers' subscriber numbers growing, the rates that these attachers charge subscribers for their services are higher now than ever. The rates that cable companies charge subscribers for standard cable television service, for example, have far outpaced inflation.[40] Since 1996, when Congress enacted the Telecommunications Act, the Consumer Price Index has risen 33.8%,[41] while the average monthly price for expanded basic programming has risen 75%, more than twice as fast, from $24.41 in 1996 to $42.76 today.[42] These higher-than-average rate increases for basic video services, when combined with new on-demand services, Internet access service, and telephone service, represent a windfall to the cable companies in light of the government-mandated and artificially low pole attachment rates that they are required to pay electric utilities for access to and use of the underlying pole distribution system.

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[38] Verizon FiOS TV Customers Have a Powerful New Way to Find and Enjoy Home Entertainment, http://newscenter.verizon.com/press-releases/verizon/2007/verizon-fios-tv-customers.html (last visited Feb. 21, 2008).

[39] The growth of AT&T's U-Verse service is equally impressive. AT&T currently has 231,000 customers for its U-Verse television service, and enrolls an additional 12,000 customers each week. AT&T will Start Offering TV Service, The Chicago Tribune, http://www.chicagotribune.com/business/chi-mon_att_0128jan28,0,2611073.story (Jan. 28, 2008)(last visited Feb. 21, 2008).

U-Verse is currently available in 5.5 million homes, but AT&T anticipates that U-Verse will be available in 30 million homes by the end of 2010. Update: AT&T: U-Verse available to 30 Million Homes in 2010, http://www.paidcontent.org/entry/419-att-u-verse-available-to-30-million-homes-in-2010-echostar-buy-unlikely/ (last visited February 22, 2008).

[40] *See* U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers, (last visited February 20, 2008) ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt. The CPI was 208.352 in June of 2007, representing a 75.2% increase from the 113.5 CPI reported in June of 1987.

[41] *Id.* The CPI was 208.352 in June of 2007, representing a 33.8% increase from the 155.7 CPI reported in June of 1996.

[42] *See* Average Monthly Price for Expanded Basic Programming Pack 1996-2007, reprinted from the National Cable and Telecommunications Association website (last visited August 13, 2007) http://www.ncta.com/ContentView.aspx?contentId=65. The average monthly price for expanded basic programming has jumped from $12.18 in 1987 to $42.76 in 2007, an increase of 251%.

While the average monthly bill for cable's expanded basic programming package in 1996 was $24.41, Comcast's average revenue per customer today is $95 per month (nearly four times as high) and growing.[43] The "triple play" of video, broadband and voice generates average monthly revenues for Comcast of $120-$130 per customer (over five times as high).[44] These figures continue to increase.[45]

Meanwhile, Comcast pays attachment rates of just a few dollars per pole *per year*. At this late date in the evolution of the cable industry, artificially low pole attachment rates for Comcast and other cable operators are an unjustified, government-mandated gift, at the expense of the electric utility industry and its ratepayers.

Many telecom providers, such as TWTC, also are huge companies that are fully capable of paying their own way. TWTC operates in 75 metropolitan markets throughout the country, with a fiber network some 24,670 miles. Its annual revenues for 2006 exceeded $800,000,000.[46] TWTC, like other attachers, is hardly in need of (or deserving of) continued government hand outs.

To the extent some kind of government mandated subsidies were appropriate to jump-start the cable or telecom industries in the early days of pole attachments, those days are long gone. Yet Comcast, TWTC and other media giants continue to get access to the most basic and essential component of "their" pole distribution systems for an artificially low fee that ill serves the nation's electric utilities and their consumers.

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[43] Comcast Corporation Form 10-K for fiscal year ending December 31, 2006 at 30.

[44] *Id* at 19.

[45] *See, Comcast Reports 2007 Results and Provides Outlook for 2008* at 1 (last visited February 20, 2008), http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=1108172&highlight== (reporting 24% growth in revenue and 25% growth in operating cash flow due largely to the addition of 523,000 new digital cable subscribers).

Unlike the profit generating incentives in place with communications companies, traditional electric utility cost of service proceedings require utilities to include all revenues from pole attachments as an offset to their revenue requirements. In that way, revenues collected from pole attachments are passed through to electric utility ratepayers in the form of reduced overall rates. For this reason, electric utilities do not have the same profit-making motive with respect to pole attachments as do cable and telecommunications companies.

e. Electric Utilities Bear 100% of the Costs Associated with Constructing Pole Distribution Systems That Communications Attachers Make Even More Expensive to Build

The beauty of the Commission's pole attachment rules, from the perspective of cable and telephone companies, is that attachers are not required to build their own pole distribution systems. They can avoid that cost entirely, by pushing it off on electric utilities. As a result, electric utility consumers essentially are being required to pay a "hidden tax" via government fiat in an effort to reduce prices for consumers of cable and telephone company services. Although electric utilities understand the benefits to the public of not constructing multiple pole distribution systems in a given area, the costs associated with the one system that all attachers share should be allocated fairly among all attachers.

The current pole attachment regime is a judgment call by the government that cable and telecom companies are more "deserving" of price breaks than electric utility ratepayers, even in an era of energy pricing concerns across the country. Electric utilities must bear 100% of the huge cost of constructing and maintaining their pole distribution systems, which attachers are then permitted to exploit at incremental costs. Cable and other communications companies do

[46] *See* Time Warner Telecom Inc., 2006 Form 10-K (on file with the Securities and Exchange Commission), at 2, 29.

not contribute a single penny to the initial construction of these systems, yet they receive 100% of the benefits as if they actually had constructed these systems themselves.[47]

Not only do electric utilities unfairly bear 100% of the costs of constructing these distribution systems for the benefit of attachers, but the systems themselves are rendered considerably more expensive to build in the first place because electric utilities must account for current communication attachments (including the communication worker safety space) and the likelihood of future communications attachments. For instance, recognizing the ongoing demand by attachers for access, Coalition members often construct pole distribution systems that are taller than otherwise required in order to accommodate the possibility of future communications attachments.

Communications attachments on taller poles create a number of additional, "hidden" operating and maintenance costs that are often not recovered by electric utility pole owners, including:

- Additional costs to trim more trees around poles with foreign attachments
- Additional costs related to trimming trees with respect to taller poles in critical (sensitive) habitat areas;
- Additional costs to work "higher" on poles, which takes longer to reach by climbing or via lift, and to transport wire, transformers, hardware, etc. through the use of larger, more expensive personnel vehicles to safely "reach" up and out far enough to perform necessary work;
- Additional costs to work around foreign attachments and the liability assumed if they are damaged;
- Additional vulnerability (reliability and legal) associated with having other employees/contractors working on utility poles;

[47] Once the distribution system is built, however, attachers may be required by utilities to pay for replacement of a pole if it is too short to accommodate their attachments.

- Additional weight load due to foreign attachments, icing and other weather conditions;
- Added safety concerns caused by high winds on taller poles with more top-loaded weight;
- Additional customer calls related to how messy (ugly) the poles look with all the attachers' wires and extra height;
- Additional costs related to extra bracing, and deeper settings required by taller poles, especially in critical areas where soil disturbance is an issue;
- Extra time required to replace taller poles and restore service during emergencies, such as when a car hits a pole, from weather damage, etc. The poles also take longer to replace due to the presence of foreign attachments; and
- Added concerns regarding easement and right-of-way restrictions, since electric utilities may not be legally authorized to allow foreign attachments on certain poles.

This list is by no means exhaustive, but it provides some sense that the larger poles required to accommodate communications attachments create additional costs and make the job of owning and maintaining poles more difficult for the pole owner.

There are numerous other "hidden" costs associated with allowing communications attachers to use electric utility poles. As described in more detail later, electric utilities often do work for attachers that attachers should be doing themselves, such as transferring attachments to newly replaced poles in a timely manner. Electric utilities often correct safety violations that attachers should correct but do not.[48] Electric utilities often respond to weather-related emergencies associated with downed wires, including communications attachments. If a communications company goes bankrupt, additional administrative requirements often are

[48] For example, attachers often balk at correcting safety violations involving their facilities if there is no conclusive proof that the attacher caused the violation. In such cases, because the utility pole owner may be ultimately responsible, the utility often if forced to correct the violation itself at its own cost.

imposed and the electric utility may be forced to remove the attacher's facilities at the utility's expense. Providing communications attachments access to extremely hazardous electric distribution systems also creates additional liabilities requiring higher insurance and legal costs. In some cases, utilities may be burdened with significant settlements and jury awards relating to communications attachments.

None of these and other "hidden" costs would be incurred by electric utilities if communications attachments were not placed on electric utility poles. Yet electric utilities are unable to recover any of these very substantial "hidden" costs through pole attachment fees.

Under existing regulations, electric utilities are required to construct these very expensive pole distribution systems and then allow attachers to "piggy back" on them by paying only a small percentage of the utilities' annual ownership and operating expenses. As mentioned, this subsidy is akin to the utility paying full price for a car (one that is considerably more expensive than the car the utility would need for its own purposes) while the attachers chips in some small percentage for gas and other expenses.

2. Unlike the FCC, Several States Have Adopted (and the House of Representatives Proposed) Rate Methodologies That Require Attachers to Pay Their Fair Share of Pole Attachment Costs

The Commission seeks comment on how the states that regulate pole attachments handle rates.[49] A number of states calculate pole attachment rates equitably and in an even-handed manner.

The pole attachment rates established by some State Public Service Commissions, like those in Delaware, Indiana and Maine, require cable and telecom attachers to pay a fairer and higher percentage of electric utility pole costs than what the FCC Telecom Rate formula (let

[49] *See* NPRM at ¶ 2.

alone the FCC Cable Rate formula) would allow. Formulas adopted by the City of Seattle and one proposed by the U.S. House of Representatives also allow for greater cost recovery. Unlike the FCC's approach, all of these approaches recognize the inherent value of the electric utilities' pole distribution systems to the attachers, as well as the costs that the attachers avoided by not being required to construct pole distribution systems of their own.

The Coalition of Concerned Utilities requests that the Commission consider these various rate methodologies and adopt the calculation used by the City of Seattle, which has been approved by Washington State Courts.

a. Seattle Rate Formula

The formula adopted by the City of Seattle, like the FCC Telecom Rate, Delaware Rate, Maine Rate, Indiana Rate, and the U.S. House of Representatives formula, allocates costs associated with "assigned space" and "common space" separately. Like Delaware, Maine and Indiana, the City of Seattle recognizes that the 40-inch communication worker safety zone is required by the NESC to separate communications attachments from electric attachments should be considered part of the "common space" on poles. The NESC, in fact, refers to this the 40-inch safety space as the "communication worker safety zone," reflecting that the entire purpose of this 40-inch space on the pole is to protect communication workers.[50]

On a presumptive 37.5-foot pole, therefore, the Seattle Rate presumes the assigned space to be 10 feet and the common space to be 27.5 feet. Like Delaware, Indiana and the U.S. House of Representatives, the costs associated with the common space on the poles are shared equally among all attachers. The costs associated with the assigned space are allocated based on the percentage of that space that is used by the attacher. Thus, on a pole with a presumed height of

[50] *See* NESC § 238.E.

37.5 feet and three attachers, each attacher would be required to contribute 27.1% to the annual costs of owning and operating the poles.

Washington State courts have found Seattle's allocation of costs to be perfectly reasonable.[51] Following a lengthy trial (TCI Cablevision, predecessor-in-interest to Comcast, called 12 witnesses), the Washington State court found that Seattle's allocation of the costs associated with the pole's support space equally among all attaching entities was "eminently reasonable."[52] The court noted that such an allocation "is based on the rationale that each user uses and benefits from the support space equally," which the court recognized as "an accepted costs accounting methodology."[53] The court concluded that "[t]here is no reasonable rationale why a profit making enterprise, such as TCI, should earn a profit by using the City's infrastructure without paying a full share of the costs."[54]

The court also accepted Seattle's equal allocation of the costs associated with the four-foot "communications worker safety zone"[55] among attachers because "it is primarily for the safety of the non-electric attachments that the 4-foot safety clearance space exists."[56] The court, in fact, concluded that it would be reasonable to allocate all of the four-foot safety space to attachers other than Seattle City Light,[57] which is how the Delaware PSC allocates those costs.

The court explicitly rejected the FCC's cost allocation methodology: "The FCC methodology for setting pole attachment rental rates is not the measure of reason; it was the

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[51] *See TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-5SEA, Findings of Fact, Conclusions of Law and Judgment (May 20, 1998, J. Learned, Washington Sup. Ct., King County) (attached hereto at Exhibit A).

[52] *Id.*, Conclusion of Law No. 27, slip op. at 21.

[53] *Id.*

[54] *Id.*, Conclusions of Law Nos. 28-29 and 56, slip op. at 21, 25.

[55] *See* NESC § 238.E.

[56] *TCI Cablevision of Washington, Inc.*, Conclusions of Law Nos. 35-37, slip op. at 22.

result of Congressional compromises and developed with the purpose and intent of helping a fledgling cable television industry, which is no longer a fledgling industry."[58] The court found that Seattle's cost allocation methodology already benefited the cable company, "because the expense of owning a portion of the poles or the expense of building its own set of poles is greater than the expense of renting space from Seattle."[59]

b. Delaware Rate Formula

Like the City of Seattle rate, the FCC Rate formulas and Delaware Rate formula are similar with respect to the calculation of the annual costs of owning and operating the poles (expressed as the "Net Cost of a Bare Pole" times the annual "Carrying Charges," using FCC terminology).[60] The primary difference lies in the allocation of those annual pole costs to the attachers.

The Staff of the Delaware Public Service Commission ("Delaware PSC") fully investigated the proper allocation of pole attachment costs among attaching entities in 1989. At that time, the Delaware PSC Staff apparently realized that the FCC's rate formulas are biased in favor of attachers because they do not require the attachers to pay for their fair share of the costs of the pole distribution system. Rather than consider the value of the distribution system to the attachers and the significant costs that attachers avoid by not having to build their own pole distribution systems, the FCC permits cable and telecommunications companies to attach for a fraction of those costs by unfairly exploiting the utility's existing pole distribution system.

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[57] *Id.*, Conclusion of Law No. 35, slip op. at 22.

[58] *Id.*, Conclusion of Law No. 47, slip op. at 24.

[59] *Id.*, Conclusion of Law No. 54, slip op. at 25.

[60] *Compare* C.D.R. § 10-800-016, 7.2.2 *with* 47 C.F.R. § 1.1409.

Contrary to either of the FCC Rate formulas, the Delaware Rate allocates 100% of the support component costs equally among all attachers. Unlike either FCC formula, this allocation recognizes that *the support component on the pole is of equal value to all attachers.* It recognizes that attachers would have had to incur significant pole costs -- far beyond the costs of simply attaching to the utility's poles -- if they were required to build their own pole distribution system, and equitably requires all attachers to share those avoided costs equally.

Unlike either FCC formula, therefore, Delaware's methodology takes into consideration the *value* of the distribution system to the attachers. Assuming three attachers on the pole, and assigning one-half of the 40-inch "communication worker safety zone"[61] space to each of the two communications attachers, the Delaware pole attachment rate would allocate 30.2% of the pole costs to the communications attacher.[62]

In implementing this rate formula, Delaware understood that a lesser allocation of costs would unfairly result in utility pole owners subsidizing the attachers. In Delaware, the proceedings that led to promulgation of its pole attachment rate rules were extensive. Over a one and one-half year period, a hearing was conducted, comments and reply comments were filed, regulations were proposed, another hearing was held, supplemental comments were filed, additional testimony, rebuttal testimony and comments were filed, additional written submissions

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[61] *See* NESC § 238.E.

[62] This 30.2% figure is derived as follows. Using a presumptive average pole height of 37.5 feet, with 20 feet of clearance and six feet of pole underground adds up to 26 feet for the support component. That leaves 11.5 feet of usable space. The total space occupied by the attacher is calculated as 12" plus ½ of the 40-inch safety space, or 2.67 feet (32 inches). Accordingly, the usable space component is calculated as (2.67 ÷ 11.5) X (11.5 ÷ 37.5) = 7.1%. The support component is calculated as 26 ÷ 37.5 ÷ 3 = 23.1% Adding the usable space and support components together equals 30.2% (7.1% + 23.1%).

were filed, a Hearing Examiner Report was filed, exceptions were filed, and oral argument before the Delaware PSC was held.[63]

During the proceeding, the Cable Television Association of Maryland, Delaware and the District of Columbia presented its full case for adoption of the FCC rate formula.[64] Commission Staff, however, found the FCC's rate to be insufficient: "Staff did not recommend adopting the FCC formula because it produces an unfair rate. The FCC rate is a very minimal rate when compared to the avoided cost of installing pole facilities."[65] The staff found that the FCC formula resulted in an "inherent subsidization" of attachers.[66] The staff considered the attachers' avoided cost of having to build their own facilities,[67] and urged the Commission to establish rates that comply with the regulatory prohibition against subsidization.[68]

The Hearing Examiner rejected the FCC's rate methodology because it failed to consider the benefit to the attacher of the support space on the pole.[69] Instead, the Hearing Examiner adopted DC's proposed rate methodology, which eliminates the FCC's subsidy by requiring attachers to pay for a fair and equal share of the support component of the pole.[70]

After reviewing the Hearing Examiner's Report and the comments of all interested parties, the Commission agreed with the Hearing Examiner and adopted its rates because they:

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[63] *In the Matter of the Adoption of Regulations Governing the Filing of Tariffs by Public Utilities for Rates, Terms and Conditions of Pole Attachments*, Findings, Opinion and Order No. 3092 (Sept. 26, 1989) ("Order No. 3092"), at **1-4, ¶¶ 1-7.

[64] Order No. 3092 at **5-6, ¶10.

[65] *Id.* at *17, ¶36.

[66] *Id.* at *17, ¶37.

[67] *Id.* at *18, ¶39.

[68] *In the Matter of the Adoption of Regulations Governing the Filing of Tariffs by Public Utilities for Rates, Terms and Conditions of Pole Attachments*, Report of the Hearing Examiner (June 12, 1989) ("Hearing Examiner Report"), at *6, ¶36.

[69] Hearing Examiner Report at **8-9, ¶51.

> establish a reasonable and efficient method for establishing and fixing just and reasonable rates, terms and conditions for utility pole attachments, and adequately consider and protect the interest of the customers of attaching entities, as well as the customers and stockholders of the host utility and the general public of the State of Delaware.[71]

c. Maine Rate Formula

Like Delaware, the primary difference between Maine's pole attachment formula and the FCC's formulas lies not in the way that pole costs are calculated, but instead in the way those costs are allocated to attachers.

In the Maine regulations,[72] different allocations apply to two different portions of the pole. The first portion, called the "assigned space," is the small portion of the pole on which attachments by electric, cable, and other entities are actually made. The costs associated with this "assigned space" are allocated among the attachers based on the percentage of the assigned space that each attacher uses. Since electric companies use a large portion of this assigned space, electric companies are required to pay more of the costs associated with this assigned space than other attachers. Thus, if a 35-foot pole is used by an electric utility, a telephone utility and a cable company, these rules would consider 7.5 feet of the pole to be "assigned space," based on the 4.5 feet of space occupied by the electric utility, 2 feet occupied by the telephone utility, and 1 foot occupied by the cable company. The costs associated with that 7.5 feet of assigned space would be allocated to each attacher based on the percentage of the 7.5 feet of space used by that attacher.

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[70] *Id.* at *11, ¶65.

[71] Order No. 3092 at **22-23, ¶47D.

[72] CMR 65-407-880, *et seq.* (2006).

The remainder of the pole that is not "assigned space" is considered to be "common space." Thus, on a 35-foot pole, all but 7.5 feet of "assigned space," or 27.5 feet of space, would be "common space."

The costs associated with the "common space" are allocated much differently. The Maine Public Utilities Commission ("Maine PUC") initially proposed that all attachers share the common space costs in equal percentages, just as Delaware with Joint Pole Ownership and Joint Use Agreements with ILECs allocated the support component. The Maine PUC changed its mind, however, and substituted a "stand-alone" cost formula. Under this "stand-alone" formula, a comparison is made of the costs that each attacher would incur if it were required to build its own stand-alone pole line.

The Maine PUC determined that if electric utilities were to build a pole distribution system for their own need alone, they would need poles that are taller, stronger, and perhaps more closely spaced, when compared with poles required for sole use by telephone or cable companies. It was also determined that telephone companies have greater pole requirements than cable companies. Under the stand-alone cost formula, common space costs are shared based on that comparison. Thus, if construction of a pole line covering a certain distance costs $24,000 for an electric utility, $20,000 for a telephone utility, and $15,000 for a cable operator, the costs of the construction of a single pole line should be shared in the ratio 24:20:15. The Maine PUC, in fact, adopted the ratio 24:20:15 to allocate common costs.[73]

[73] The Maine PUC explains its cost allocation methodology in State of Maine Public Utilities Commission, *Re: Proposed Amendment to Chapter 88, Attachments to Joint-Use Utility Poles; Determination and Allocation of Costs; Procedure (Chapter 880)*, Docket No. 93-087, Order Adopting Rule Policy and Basis Statement, at 19-23 (Oct. 18, 1993).

For comparison purposes, on a presumptive 37.5-foot pole, Maine would allocate 23.0% of total pole costs to the cable attacher, 32.4% of the costs to the telecom attacher, and the remaining 44.6% to the electric utility.

d. Indiana Rate Formula

The Indiana Utility Regulatory Commission ("IURC") in March 2006 adopted a methodology for calculating pole attachment rates that is also consistent with Delaware's methodology.[74] The recent Indiana decision specifically involved a rural electric cooperative.

Like Delaware and Maine, the difference between Indiana's and the FCC's rate calculations lies not in the calculation of pole costs, but in how those costs are allocated. Like the FCC, Indiana divided the pole into usable and unusable space. However, unlike the FCC (and consistent with Delaware and longstanding Joint Pole Ownership and Joint Use Agreements with ILECs), Indiana allocated 100% of the costs associated with unusable space equally among all attaching entities, including the pole owner.[75]

Like Delaware, Indiana adopted a methodology for allocating unusable costs which recognizes that all entities benefit equally from the unusable space on the pole. It also should be noted that in the Indiana proceeding, both of the telephone companies that participated in the proceeding (Sprint and SBC Indiana), supported and actually proposed this allocation methodology as providing a reasonable basis for calculating rates.[76]

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[74] Indiana Utility Regulatory Commission, *In the Matter of the Complaint by United Telephone Company of Indiana, Inc. d/b/a Sprint Against Kankakee Valley Rural Electric Membership Corporation Concerning the Failure and Refusal of Kankakee Valley Rural Electric Membership Corporation to Negotiate Reasonable Compensation Permitting Sprint to Use Poles and Other Equipment Owned by Kankakee Located on, Over, or Under Various Streets and Highways*, Cause No. 42755 (approved Mar. 22, 2006) ("Indiana Order").

[75] *Id* at 16 ("SBC Indiana and Sprint's proposal allocates all of the non-useable space among all of the attaching parties, including KVREMC.") The IURC adopted Sprint's methodology at p. 17.

[76] *Id.*

Of additional benefit to utility pole owners, Indiana further departed from FCC regulations by not employing the FCC's pole height and usable space/unusable space presumptions. As mentioned, the FCC uses a presumptive average 37.5-foot pole with 24 feet of unusable space. The FCC therefore presumes that there are 13.5 feet of usable space on the pole regardless of whether that amount of space is actually occupied. In contrast, Indiana based its cost allocation on a taller 40-foot pole, and then counted as usable space only that small portion of the pole that is actually used by attachers. Indiana then determined that the electric utility used 3.5 feet of space and that each attacher used one foot of space.[77]

Those determinations left 35.5 feet of unusable space (40 - 3.5 - 1 = 35.5) on two-attacher poles, and 34.5 feet of unusable space on three-attacher poles. This unusable space on the pole was then allocated evenly among the electric utility and other attacher(s). Accordingly, on a two-attacher pole, the non-electric utility attacher was allocated 17.75 feet of space (35.5 ÷ 2 = 17.75), and on three-attacher poles 11.5 feet was allocated to each non-electric utility attacher (34.5 ÷ 3 = 11.5).

Once this allocation of unusable space was made, the amount of space actually occupied by the attacher was added to that figure. On two-attacher poles, therefore, the electric utility was required to pay for costs associated with 21.25 feet of the total 40 feet of space on the pole (17.75

[77] The IURC adopted Sprint's cost allocation methodology, which allocated 46.88% of total pole costs to the communications attacher on a two-attacher pole. *Id* at 17. The IURC explained that the only difference between Sprint's cost allocation methodology and Kankakee Valley Rural Electric Membership Corporation's ("KVREMC's") methodology was that KVREMC allocated 100% of the 40" (rounded to 3.5 feet) safety space to the communications attacher, while Sprint split this 3.5 feet of safety space equally. *Id.* at 16. Based on the explanation of KVREMC's cost allocation by KVREMC's witness Mr. Hale (*Id.* at 11), it is apparent that the Sprint methodology adopted by the IURC considered 32 feet on the pole to be unusable space whose costs should be shared equally, 16 feet for the attacher and 16 feet for the utility. The attacher was assigned an additional one foot for its attachment and 1.75 feet for one-half of the 3.5-foot safety space, for a total of 18.75 feet (16 + 1 + 1.75). The utility was assigned 16 feet for the common space, 3.5 feet for its attachments, and then its 1.75 half of the safety space, for a total of 21.25 feet (16 + 3.5 + 1.75). On a forty-foot, two-attacher pole, therefore, the communications attacher would be responsible for 18.75/40 of the costs, or 46.88%.

+ 3.5 = 21.25), and the non-electric utility attacher was required to pay for 18.75 feet of space (17.75 + 1 = 18.75). On three-attacher poles, the electric utility was required to pay for costs associated with 15 feet of space (11.5 + 3.5 = 15), while each of the two non-electric utility attachers was required to pay for costs associated with 12.5 feet of space (11.5 + 1 = 12.5).

Thus, the percentage of total annual pole costs that a non-electric utility attacher on a two-attacher pole must pay was established at 46.88% (18.75 ÷ 40 = 46.88%). The percentage of total annual pole costs that each non-electric utility attacher would have to pay on three-attacher poles was established at 31.25% (12.5 ÷ 40 = 31.25%).

Another unique characteristic of Indiana's methodology is that, unlike the FCC, Indiana required the utility pole owner to charge only one blended pole attachment rate, instead of one rate for two-attacher poles and another for three-attacher poles. In order to determine this blended rate, the IURC counted the number of two-attacher and three-attacher poles, and then calculated a weighted average of the two rates.

e. U.S. House of Representatives Formula

Prior to enactment of the 1996 Telecommunications Act, the United States House of Representatives adopted a pole attachment rate methodology that was identical to the FCC Telecom Rate actually enacted by Congress except that, as with the Delaware and Indiana rates, the unusable space on the pole was allocated 100% among all attachers.[78] Although the House voted to approve this approach as a reasonable rate calculation methodology, it was rejected

[78] Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 89-90 (February 1, 1996) ("Conference Report").

without explanation by the House-Senate Conference Committee in favor of the existing FCC Telecom Rate.[79]

Using the U.S. House of Representatives formula, and assuming a 37.5-foot pole with three attachers, each non-electric utility attacher would be required to contribute 24.0% to the utility's annual costs of owning and operating the poles.

f. All of the Above Formulas Allow for Greater Cost Recovery Because They Recognize the Value of the Pole Distribution Systems That These Attachers Did Not Have to Construct Themselves

Applying the formulas discussed above, the following table lists the percentage of annual pole-related costs that utility pole owners can recover from each attacher under each formula, assuming three attachers per pole and a 37.5 foot average pole height.

	FCC Cable	FCC Telecom	Delaware	Maine	Indiana	U.S. House	Seattle
% of Annual Pole Costs Allocated to Each Attacher	7.4%	16.9%	30.2%	32.4% (telco) 23.0% (cable)	31.25%*	24.0%	27.1%

* assumes 40-foot pole

The FCC rates fall far below what these other states, the U.S. House of Representatives and the Washington State Superior Courts have found to be reasonable and necessary to avoid unfair subsidies to attaching entities.

[79] *Id* at 90. In *TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-5SEA, Findings of Fact, Conclusions of Law and Judgment (May 20, 1998, J. Learned, Washington Sup. Ct., King County) (attached hereto at Exhibit A) the court concluded that Congress's final adoption of the FCC Telecom Rate allocation was "primarily a political compromise, and not based on cost accounting issues." *See* Exh. A, Finding of Fact No. 90, slip op. at 13.

3. A Single, Unified Pole Attachment Rate Should be Applied to all Attachers Offering Broadband Services

The Commission asks whether all attachments used for broadband Internet access service be subject to a single rate and if so, what that rate should be.[80] The Coalition of Concerned Utilities agrees that while a single, unified rate for the provision of broadband services would be preferable, it should fully reflect the attachers' avoided costs. Furthermore, it should be presumptively applied to all attachments.

a. All Pole Attachments Used to Provided Broadband Services Should be Subject to a Single, Unified Rate Based the Attachers' Avoided Costs

The Coalition agrees in principle with the concept discussed in the NPRM, that similarly-situated attaching entities which are subject to FCC jurisdiction should pay similar pole attachment rates. Fairness requires no less.

On the other hand, there is absolutely no public policy reason for the Commission to continue the subsidization of the cable and telecom industries by requiring payment of broadband rates that do not reflect a fair allocation of the maintenance and operating costs that are avoided by attaching entities as described above. Attachers offering broadband services should pay their fair share of the costs of owning and operating "their" pole distribution systems. Anything less would be a continued government mandated subsidy in favor of certain industries (cable, telecom) over another (electric utility), thereby resulting in a continuation of the hidden "taxes" on electric utility ratepayers.

[80] NPRM at ¶¶ 6, 9, 11, 14, 15, 22.

Although the Pole Attachment Act specifies just two rates, nothing in the Act prohibits the Commission from establishing a third rate to cover broadband providers not explicitly covered by the cable or telecom rates.

Sections 224(d) and (e) of the Act establish two different pole attachment formulas, one covering pole attachments used by "a cable television system solely to provide cable service,"[81] and one for pole attachments used by "telecommunications carriers to provide telecommunications services."[82] Broadband Internet access service is not a "cable service"[83] nor a "telecommunications service,"[84] and the Pole Attachment Act does not address rates for entities that provide such service.

Considering the difference in the nature of the services provided, the FCC is entitled to establish a rate for entities that provide broadband service that varies from the cable and telecom rates specified in the Pole Attachment Act. This type of authority was confirmed by the Supreme Court in its 2002 *Gulf Power* decision.[85]

In *Gulf Power*, the Court specifically rejected the Eleventh Circuit's conclusion that the FCC could establish no other pole attachment rates besides the cable and telecommunications rates.[86] In rejecting this conclusion, the Supreme Court held that the Commission was free to establish a different rate for commingled services: "Congress did indeed prescribe two formulas for 'just and reasonable' rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates

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[81] 47 U.S.C. § 224(d)(3).

[82] 47 U.S.C. § 224(e)(1).

[83] 47 U.S.C. § 522 (6).

[84] 47 U.S.C. § 153 (46).

[85] *National Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, (2002).

allowed."[87] The Court reasoned that if attachments used to provide commingled cable and Internet access service were not subject to the cable rate, "this would simply mean that the FCC must prescribe just and reasonable rates for them without necessary reliance upon a specific statutory formula devised by Congress."[88]

The Commission is therefore free to establish a broadband rate for cable systems that is just and reasonable although different from the rate that applies to cable systems providing only cable service. It is also free to establish a rate for telecommunications carriers providing broadband service that is different than the rate specified for telecommunications carriers providing telecommunications service alone.

A rate for commingled telecommunications and broadband service that is higher than the rate for telecommunications service alone makes sense as a "surcharge" on the basic rate paid by a telecommunications carrier providing telecommunications service. The telecommunications carrier providing telecommunications service is still being charged the telecommunications rate, but the surcharge applies to its added provision of broadband services.

b. The Commission Should Adopt the City of Seattle Rate as the Broadband Rate

With that in mind, the Coalition proposes that the single, unified rate for all broadband attachers should be based upon the cost allocation methodology employed by the City of Seattle and blessed by Washington State Courts, as explained above.

The Coalition is not, in this proceeding, proposing modifications to how the "Net Cost of a Bare Pole" and "Carrying Charges" components of the formula should be calculated. While (as

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[86] *Id.* at 335-36.

[87] *Id.* at 335.

[88] *Id.* at 336.

discussed earlier) there are areas of costs that are currently excluded from the computation of the Net Cost of a Bare Pole, the Commission's current methodology is at least workable. The "Space Factor" component of the calculation, however, should be modified consistent with the approach adopted by the City of Seattle.

The City of Seattle's cost allocation factor allocates the common space on the pole equally among all attaching entities and includes the 40-inch communication worker zone in the common space. As explained by the Washington Courts, this allocation makes perfect sense, because all attaching entities benefit equally from the common space.[89]

This proposed broadband rate formula can be expressed as follows:

MAXIMUM RATE (Broadband)	=	FCC Broadband Rate Space Allocation Percentage	x	Net Cost of a Bare Pole	x	Carrying Charge Rate

$$\textbf{FCC BROADBAND RATE SPACE ALLOCATION PERCENTAGE} = \frac{\text{Space Occupied} + \frac{\text{Common Space (Includes 40" Safety Space)}}{\text{No. of Attaching Entities}}}{\text{Pole Height}}$$

The new formula focuses solely on the use of the facility for broadband purposes, irrespective of whether the broadband attachment also is used as a cable attachment, phone, or otherwise. Cable or CLEC attachers should pay the higher rate if any broadband-based services are offered.

All poles located in an area where an attacher advertises or otherwise offers broadband service should be conclusively presumed to be used to provide broadband service and should be subject to the broadband rate.

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[89] *TCI Cablevision of Washington,* Exhibit A.

To implement the formula fairly and uniformly, all attachers should be required to provide written certification to the pole owner every six months by municipality, identifying services offered within the municipality. Any attacher failing to accurately report such broadband attachments should be subject to a penalty similar to an unauthorized attachment penalty described below.

Lastly, in recognition of the increased deployment of broadband services by all attachers, the Commission should establish a presumption that all attachments are used to offer or provide broadband services, subject to rebuttal by an attacher. Such a presumption would reflect the overwhelming trend for attachers to provide broadband services and would simplify the administration of rental fees for electric utilities.

c. TWTC's Apparent Abuse of Commission Rules Illustrates the Need for a Single Broadband Rate

The Commission points to a so-called *White Paper* by Time Warner Telecom ("TWTC"), which discusses the rate that a cable operator not providing telecommunications services must pay if it leases capacity to a provider of telecommunications service.[90] Since cable companies offering broadband and video services pay a lower attachment rate than telcos offering the same type of service, TWTC argues for a lower, cable-like attachment rate. We agree on the appropriateness of a unified, broadband rate, but not for the reasons stated by TWTC in its Petition, and not at the give-away level recommended by TWTC.

In its *White Paper* complaining that telecom attachment rates are too high, TWTC correctly notes that "an existing pole attachment [that is] subject to the lower [cable] rate becomes subject to the higher telecommunications carrier rate when a carrier simply leases fiber

[90] NPRM at ¶ 4.

within an existing attachment to provide a telecommunications service."[91] As TWTC concedes, "where TWTC leases a strand of fiber to provide telecommunications services, the rate applicable to the pole attachment increases up to two-to-three times to the Telecom Service Rate."[92] According to its *White Paper*, TWTC is responsible for paying this rate differential when it provides telecom services via someone else's cable attachment.[93]

Pole owners, of course, can only invoice for such higher rates to the extent they have knowledge of the Telecommunications Company's service offerings. Instead of paying the higher rate, however, TWTC apparently has come up with a more cost-effective alternative of its own: don't tell the utility pole owner about the use of the cable attachments for telecom services, and let the cable company continue to pay the lower cable rate. That way, as a practical matter, the "rate differential" that TWTC says it is responsible for paying quickly drops to zero.

Several years ago, CenterPoint, an electric utility serving Houston and other areas of Texas, filed a Complaint with the Commission regarding TWTC's use of a cable company's attachments to CenterPoint's poles.[94] The central issue was TWTC's use of cable attachments for telecom purposes with no notice to the utility and no payment of the telecom rate.

CenterPoint and TWTC had not entered into a pole attachment agreement. TWTC instead had entered into a "Master License Agreement" with the local cable operator, pursuant to

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[91] TWTC *White Paper* at 2.

[92] *Id.* at 11.

[93] *Id.*

[94] CenterPoint Energy Houston Electric, LLC, Revised Complaint, *In the Matter of CenterPoint Energy Houston Electric, LLC v. Texas Cable Partners, L.P., d/b/a Time Warner Cable*, EB-04-MD-009 (filed July 16, 2004) (hereinafter cited as "CenterPoint Revised Complaint").

which TWTC was authorized to use cable attachments to provide telecom services in 19 specific cities across the country.[95]

As it pointed out in its *White Paper*, TWTC was responsible under the Master License Agreement for paying the differential between the cable and telecom rates.[96] Apparently, however, (and here's where the real cost savings for TWTC comes into play), no one advised CenterPoint that thousands of "cable" attachments to CenterPoint's poles were being used for telecom -- not cable -- purposes. As a result, conveniently for TWTC, the "rate differential" for all of these attachments was zero.

Tampa Electric raised a strikingly similar complaint with the Commission regarding TWTC's use of cable attachments for telecom purposes in Florida. Tampa Electric complained that TWTC overlashed or leased fiber on thousands of cable attachments for the provision of circuit switched telephone service. As in *CenterPoint*, TWTC and the cable company neglected to mention that fact to Tampa Electric – or to pay the higher telecom rate (for which, apparently, TWTC was "responsible").[97]

TWTC situation in Texas and in Florida does not appear to be unique. TWTC appears to have routinely used "cable" attachments for telecom purposes without notification to the utility from the cable company or TWTC and without payment of the telecom rate differential. Regardless of whether the cable company or TWTC should notify the utility (which may explain TWTC's apparent confusion regarding the Commission's "notice" requirements), the electric

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[95] *See* Master Terms and Conditions Capacity License Agreement, dated July 1, 1998, attached to CenterPoint Revised Complaint at Exh. 19.

[96] *Id.* at Sec. 6.

[97] *See* Tampa Electric Company, Tampa Electric Company's Response to Pole Attachment Complaint of Bright House Networks, LLC, *In the Matter of Bright House Networks, LLC v. Tampa Electric Co.*, EB-06-MD-003 (filed March 29, 2006), at 1-2.

utility clearly is entitled to be told about the use of its poles for telecom purposes and to be paid the telecom rate. Any scheme to avoid this fundamental obligation is contrary to the FCC's requirements and public policy.

The Commission's pole attachments rules already unduly favor attachers. Some attachers routinely ignore their obligations. Some use attachments for telecom purposes without paying the telecom rate. Some place attachments on utility poles without even seeking permission in advance. In some cases, *thousands* of attachments have been placed on poles *for years*, without any advance permitting or approvals and without payment of any attachment fees whatsoever. Many of these and other attachments are in violation of applicable electric safety codes, thereby endangering the public as well as electric utility personnel.

The Commission should reject TWTC's transparent attempts to convert an already favorable government mandated pole attachment subsidy into an outright give-away. Further overburdening the owners and operators of the nation's electric utility distribution system – who are dedicated to the safe, reliable and efficient distribution of electric utility services – would be a seriously misplaced public policy in this day and age.

4. The Commission Should Take a "Hands Off" Approach to Wireless Attachment Rates

The Commission has asked for an appropriate rate for wireless attachments, including those located on top of the pole.[98] The Coalition urges the Commission not to set a mandated wireless attachment rate or otherwise to impose obligations on utilities regarding wireless attachments. Wireless attachers have other deployment options (e.g., cell towers, monopoles, building rooftops). Utility poles are not "bottle-neck" facilities as they relate to the deployment

[98] NPRM at ¶¶ 8, 14.

of wireless attachments, and the FCC should not impose access obligation on pole owners nor establish regulations regarding such use. Wireless attachments should be handled by marketplace negotiations without government oversight.

Many of the members of the Coalition, for good and valuable reasons, treat wireless attachments differently than wire attachments. Wireless attachments raise a host of operational and safety concerns, and each utility must make its own decision whether it is comfortable permitting wireless attachments on its electric distribution system. Since pole tops cannot be used for more than one antenna, marketplace considerations are particularly appropriate.

A number of questions and concerns related to wireless attachments are highlighted below. This is not an exhaustive list, but it summarizes some of the difficulties for utilities in dealing with wireless attachment requests.

Electric Service Reliability. Many Public Service Commissions that regulate utility electric service have expressed growing concerns with electricity reliability. How will wireless attachments affect reliability? What is the potential that wireless equipment will fall onto or otherwise interfere with energized facilities? How will restoration times be affected?

Operational Ramifications. What are the operational ramifications of permitting attachments in the power space? Will there be any adverse impact on electric system reliability? Will there be any impact on electric system operations and maintenance? How does it affect climbing clearances? How will electric utility activity be limited by such attachments? What are the performance standards associated with these attachments? How much routine maintenance is required? Who performs the maintenance and how will it affect utility operations? What kind of notification is required? What are the additional liability issues? Are there tree trimming

requirements to maintain line of sight for the wireless antenna? How would the utility handle any metered electric service that may be required?

Radio-Frequency ("RF") Concerns. How serious are the health effects to utility crews? How dangerous are the antennas that the carrier is proposing to install? Will RF warning signs need to be posted? Are RF detection meters required? Is an on/off switch required? How will the utility's linemen and attachers' communications workers be trained? Who will pay for that training?

OSHA Requirements. What are the OSHA implications of locating wireless transmitters and receivers on utility poles? How does it affect climbing clearances? How much does the fall hazard increase if this additional equipment is located in the power space? Is additional fall protection equipment required? How much does the fall hazard increase if this additional equipment is located in the power space? Is additional fall protection equipment required?

Worker Qualifications/Utility Oversight. Who is qualified to perform this work? Who should perform the work? Is electric utility oversight required? If so, will the utility pole owner incur greater liability for mishaps because of such oversight?

Utility Liability. What is the potential liability to electric utilities in allowing non-utility access to and use of electric utility space for RF purposes? To what extent may utilities be held responsible for damages related to access and use of pole top antennas?

Emergency Restorations. In addition to RF and OSHA training, what other training is required to restore wireless attachments during emergencies? How would emergency restorations be handled? Who performs the work? Are those people qualified? What kind of

notification is required? What additional liability issues may be created? What training is required to ensure non-interference with wireless facilities?

Capacity Concerns. From an engineering standpoint, is there sufficient room at the top of the utility's poles to accommodate wireless attachments? Some utilities have installed energized lines across the tops of its poles. To what extent will necessary utility uses of the poles be blocked if wireless attachments are permitted?

Wind and Ice Loading. What are the wind and ice loading considerations with respect to the proposed wireless attachments? Will stronger or taller poles be required?

Interference Issues. Equipment will need to be tested to ensure that it does not interfere with SCADA and other utility radio communications.

Prototype. In order to help determine whether wireless attachments can be safety deployed in the utility's electric space, the utility may need to construct a prototype distribution pole with different wireless antennas on top. Who pays for the development and testing of such a pole?

Easements/Rights-of-Way/Local Municipal Approval. Many (if not most) franchises granted to electric utilities permit attachments only by entities that have obtained city or county permission to use those rights-of-way, and many (if not most) utility easements do not establish ingress or egress rights on private property. To what extent has the entity seeking to install wireless attachments obtained permission from landowners and appropriate authorities to attach its wireless antennas and other facilities to the utility's facilities? Do wireless facilities conform to local zoning (ordinances)?

Recovery of Costs. Resolving these issues of whether it would be possible from a capacity, safety and engineering standpoint to grant an entity access to a utility's pole tops is time

consuming and expensive. Utility pole owners would not need to engage in this analysis but for the request of attaching entities. The Commission therefore should clarify that any expenses incurred by an electric utility pole owner to determine whether a wireless attachment is feasible should be borne by the entity seeking such a determination, whether access is granted or not.

In short, there are many unanswered questions related to the government mandated placement of wireless attachments on utility pole tops or elsewhere on the poles. The Coalition urges the Commission to proceed cautiously.

B. MODIFYING EXISTING JOINT USE/JOINT OWNERSHIP RELATIONSHIPS TO FAVOR ILECS WOULD BE UNWARRANTED AND CONTRARY TO THE POLE ATTACHMENT ACT

The Commission seeks background information on "joint use" and "joint ownership" relationships and asks whether there may be some change in the bargaining power between electric utilities and ILECs, given that electric utilities may now own more poles than do ILECs.[99]

Contrary to various allegations by ILECS, they are not the "victims" under Joint Use. Over the years, as wireline businesses have shrunk with the proliferation of wireless services, ILECS often have abandoned their Joint Use responsibilities, shackling electric utilities with a disproportionate burden of pole installation and maintenance. The ILECs' abandonment of their traditional joint use responsibilities, not any "abuse of market power" by electric utilities, is the primary reason why utilities have come to own a higher percentage of joint use poles.

The USTA Petition seeks "just and reasonable" rates for ILECs while neglecting any similar requirement for electric utilities. It ignores decades of joint use relationships and at least 10 years of history at the Commission. Moreover, it distorts applicable statutory language. It is,

[99] NPRM at ¶ 6.

in essence, an unjustified attempt by the nation's ILEC trade association to avoid costs and obligations to gain a competitive advantage for its members.

1. Joint Use and Joint Ownership Arrangements Are Fundamentally Different Than Pole Attachment Agreements

ILECs share the use of their poles with electric utilities -- and in turn electric utilities share the use of their poles with ILECs -- pursuant to well established joint use arrangements which were originally established more than 50-60 years ago.

ILECs do not simply attach to electric utility poles as do cable companies and competitive local exchange carriers ("CLECs"). Unlike cable companies and CLECs, which do not own their own distribution poles, ILECs do own and control millions of distribution poles across the country. Cable companies, CLECs -- *and electric utilities* -- rely on access to ILEC-owned poles in order to distribute their respective services to consumers.

Under a cable or CLEC pole attachment agreement, an attacher is dependent on the pole owner for access to its customers (since the attacher controls no poles of its own). The pole owner is not similarly dependent on the attacher.

In a joint use arrangement, however, both parties are dependent on the other for access to customers, because both parties are pole owners in their own right.[100] As a result, a natural governor limits abuse in any joint use arrangement by either party. Since each party is dependent upon access to the other's poles, each is motivated to treat the other in a fair and nondiscriminatory manner on mutually acceptable terms and conditions.

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[100] Congress has been aware of the special relationship between electric and telephone utilities since enactment of the 1978 Pole Attachment Act. The Senate Report notes that approximately 70% of poles owned by electric or telephone utilities are subject to joint use arrangements. S. Rep. No. 95-580, at 12 (1977).

This mutual dependency explains why joint use agreements contain vastly different terms and conditions than pole attachment agreements. Pursuant to most joint use agreements, each party is expected to set an equal number (or a defined percentage) of new poles, inspect and replace the poles when they become defective, and expend the necessary resources to maintain those poles. Because of this mutual dependency, joint use agreements, unlike pole attachment agreements, often require that the agreement stay in effect for all existing attachments, even after the term of the agreement has expired.

Unlike pole attachment agreements, joint use agreements often provide for a sharing of pole costs based on a much more reasonable allocation of costs than current FCC rules require third parties to pay.[101] Such commercial terms were established through arms-length negotiations, and this arrangement makes eminent sense (since each party is reliant on access to the other's poles) and is part of the shared access concept that has been at the heart of joint use contracts for decades.[102]

Requiring both parties to share pole costs is mutually satisfactory because each party otherwise would be required to incur far greater costs by setting its own lines of duplicative poles. Moreover, without joint use the public would be burdened unnecessarily by dual poles on rights of way and private easements throughout the country.

Pursuant to many joint use agreements entered into by Coalition members and their ILEC partners, the ILEC is allocated between 2-3 feet of space on the pole for its attachments, and the electric utility is allocated 4.5-8 feet due to safety and operational requirements. Other joint use

[101] In some joint use agreements, for example, the annual rental that each party must pay to the other recognizes the disparity in the gross amount of usable space allocated to each party by basing pole rentals on a defined and specified ratio. However, both parties are required to share equally in the costs attributable to the unusable space on the pole, which can account for the majority of pole costs.

agreements may be designed so that neither party pays rental fees to the other unless one party owns a deficient number of poles. Unlike pole attachment agreements, ILECs often are entitled to rent portions of their allocated space to other telecommunications attachers. Joint use contracts also often specify which pole owner will pay for stronger or taller poles that may be required by one of the parties or by a government entity.

An alternate ILEC and Electric Company arrangement is the "joint ownership" relationship, a contracted sharing of the full cost of the jointly owned and operated pole plant. As discussed later, several of the Coalition members operate through joint use arrangements with their ILECs. Under this form of agreement, the electric utility and ILEC both maintain an ownership interest in each pole that they share. The "joint ownership" relationship, however, usually involves far more coordination between the pole owners with respect to third party attachments and the maintenance and other activities associated with the poles.

For example, in some joint ownership arrangements, a third party attacher may need to obtain a permit to attach from both pole owners, each of which will have separate and distinct attachment agreements, installation standards, work practices, labor agreements, and other concerns. Unlike joint users, joint owners often coordinate to varying degrees daily operations such as survey and make-ready work, installation inspections and pole change outs.

Sometimes, joint owners will agree to divide responsibilities for the poles so that one owner will be the "custodian" of some poles and the other owner will be the "custodian" of the others. Although these "custodial" requirements can vary, in some cases third party licensing is covered by the custodian, along with other maintenance, management, inspection, replacement and administrative activities associated with the pole, although those costs are often shared.

In general, much more than joint use arrangements, joint ownership arrangements are dependent upon having a cooperative working relationship. It is more analogous to a marriage than to a landlord/tenant relationship. Each jointly-owned pole is a potential point of contention.

Not all members of the Coalition own and operate joint poles in the same manner. As shown by the chart below, the poles of DP&L and KCP&L are subject to joint use arrangements, the poles of BGE, National Grid and NSTAR are subject to joint ownership arrangements, and Allegheny Power's and First Energy's poles are subject to both.

Table 3
JOINT USE/JOINT OWNERSHIP

	Allegheny Power	BG&E	DP&L	KC P&L	National Grid	NSTAR	JCP&L*	The Illuminating Company*	Penelec*	Met-Ed*	Toledo Edison Company*	Ohio Edison & Penn Power*
# of Poles owned by ILEC to which you attach	132,000	0	36,223	38,458	4,000	N/A	288,955	0	116,205	61,692	30,159	287,000
# of Poles owned in whole or in part	1,600,000	382,089	322,629	271,271	2,303,700	388,000	510,000	407,299	496,104	340,239	255,000	751,900
# of Poles owned jointly with an ILEC	439,000	291,000	0	0	1,653,000	320,000	0	233,372	0	0	0	300
# of Poles owned in whole or in part on which an ILEC is attached	500,000	N/A	83,010	40,301	1,717,000	N/A	N/A	N/A	261,775	215,792	69,741	476,000
Approx % of ILEC attachments that are subject to a joint use agreement	20%	0%	100%	N/A	0%	0%	100%	0%	99.5%	99.5%	61%	100%
Approx % of ILEC attachments subject to a joint ownership agreement	77%	100%	0%	N/A	100%	100%	0	100%	0%	0%	0%	0%
Approx % of ILEC attachments subject to a pole attachment agreement	0%	0%	0%	N/A	0%	0%	100%	.7%	<1% (one contract covering 700-800 poles)	<1% (one contract covering 700-800 poles)	0%	0%

* -- FirstEnergy Operating Companies.

USTelecom's Petition completely ignores the substantial differences between pole attachment and joint use arrangements. By not recognizing these differences, the Petition paints a false picture of the relationship between electric utilities and ILECs and attempts to mislead the Commission into substituting a CLEC-type pole attachment regime for well established and publicly beneficial joint use arrangements.

2. Joint Use and Joint Ownership Rates Are Different Than Pole Attachment Rates Because They Are Based on an Entirely Different Relationship That Provides Significant Benefits to ILECs

By virtue of their status as a pole owner, ILECs receive a whole host of advantages that third party attachers like cable companies and CLECs do not enjoy. As a result, permitting ILECs to receive the same rate as cable companies and CLECs would be grossly unfair to the cable companies and CLECs (as well as to electric utilities). A brief, non-exclusive list of some of the unique benefits received by ILECS, which are not available to third party attachers in traditional pole attachment agreements, follows.

a. Make Ready Costs are Often Reduced as a Result of Initial Coordination.

Most joint use and joint ownership agreements contain mechanisms under which the entity initially planning to construct a pole line will notify the other party and offer the opportunity to attach. If the other party seeks to attach, the pole line as originally designed and installed will be of sufficient height and strength to accommodate both parties. This historically has minimized the make-ready work that often occurs with cable and CLEC proposals to attach to already constructed poles that were not designed to accommodate multiple attachments.

b. ILECs need not seek approval from the electric utility pole owner to make attachments.

Cable companies and CLECs are usually required to obtain advance approval from at least one pole owner (and usually two in joint ownership situations) before installing new attachments. ILECs, on the other hand, typically are not subject to that requirement. Verizon and AT&T, for instance, have been installing new fiber as part of their FiOS and U-Verse video services roll-outs without such an impediment under longstanding Joint Use Agreements. Unlike cable companies and CLECs, their rights as pole owners entitle them to roll out these services with very little oversight by their fellow pole owners. In short, they can proceed with their roll outs as quickly as they wish without being slowed down by any pole owner.

c. ILECs need not incur the costs associated with post inspections as cable companies and CLECs are often required to incur.

Since ILECs often need not obtain utility pole owner approval for their attachments, these requirements are not applicable.

d. Electric utilities often obtain rights-of-way for ILECs.

In many joint use and joint ownership agreements, the party which owns or is the "custodian" of the pole often is required to obtain rights-of-way, highway permits and other authorizations on behalf of both parties to the joint use or joint ownership agreement. Since electric utilities are currently responsible for setting most new poles, electric utilities are performing this task on behalf of ILECs far more than ILECs do so for electric utilities. Cable companies and CLECs are required to get their own.

e. Joint Use and Joint Ownership Agreements Often Entitle ILECs to a Certain Number of Feet on the Pole, Regardless of Whether They Have a Current Need for That Space.

Cable companies and CLECs generally rent only the one-foot of space on the pole that they currently need. Joint use and joint ownership agreements often entitle ILECs to a certain number of feet on the pole, regardless of whether they have a current need for that space. With the extra space available under joint use, ILECs can expand their facilities with greater ease, plan for emergencies and future needs, and have less need to incur the cost of changing out a pole to meet their requirements.

f. ILECs Avoid Relocation and Rearrangement Costs.

Pursuant to some joint use and joint ownership agreements, ILECs are not required to pay for the relocation of electric company facilities when poles must be rearranged to accommodate the ILECs attachments.[103] In contrast, third party pole attachment agreements with cable companies and CLECs require the cable company or CLEC to pay to relocate both the ILEC and electric company.

3. Unless Specified in a Contract, ILECs Often Avoid Costs Charged to Other Attachers.

As noted above, make-ready costs for ILECs are often negligible due to prior coordination as a pole line is initially constructed. Even when make ready costs are incurred, some ILECs have refused to reimburse electric utilities fully, claiming that the electric utility's costs are "too high." This is especially true during emergency responses when costs are higher due to the necessity of paying overtime rates.

[103] In these agreements, electric companies do not need to pay for the relocation of ILEC facilities either, but the costs associated with relocating electric facilities is much greater.

For safety and reliability reasons, electric companies often use in-house crews to perform pole setting and make ready work. Electric utility employees are better trained and better qualified than many outside contractors to work on utility poles carrying electric lines. ILECs believe that electric company costs should be based on those of contractors who can perform these jobs less expensively, regardless of the electric company's actual costs. ILECs have routinely resisted payment of these actual costs. The result is that electric companies are not being reimbursed for millions of dollars of engineering and make-ready expenses for which the ILECs are enjoying a free ride. Cable companies and CLECs are required by contract to pay the electric company's actual costs.

4. ILECs Have Used Their Leverage in Joint Use and Joint Owner Relationships to Abdicate Their Joint Use Responsibilities

The Commission has asked whether there may be some change in the bargaining power between electric utilities and ILECs, given that electric utilities may now own more poles than do ILECs.[104] This inquiry harks back to the various claims of USTelecom that "energy utilities are able to leverage their position to effect arbitrage and impose unreasonable rates on ILECs;"[105] that ILECs need a right of action in the Commission's pole attachment rules to prevent energy utilities from imposing unreasonable rates, terms and conditions upon them;[106] and that energy utilities can unreasonably discriminate against ILECs with respect to pole attachments.[107]

These arguments are utter nonsense. Electric utilities are in no position to discriminate against any ILEC. Take DP&L, for example. At last count, 119,233 utility poles were subject to

[104] NPRM at ¶ 6.

[105] Petition at 12.

[106] *Id.* at 13.

[107] *Id.* at 15.

joint use arrangements between DP&L and an ILEC. Of these, DP&L is completely dependent on the ILECs for access to 36,223 poles, or 30% of the total. Because each party to these joint use agreements is dependent on the other for access to the other's poles, both parties are in equal bargaining positions. In light of their equal bargaining positions, there is no need for government intervention to prevent abuses.

The fact that over the last decade or so, the percentage of poles owned by electric utilities has increased relative to that owned by ILECs is not an indication that the electric utilities have abused any market power. It is, in fact, an indicator that ILECs have found it more profitable to reduce their ownership share and let the electric utility install all or the vast majority of poles.[108] For various reasons including the pressure that is brought to bear if a new development does not receive electric service promptly, electric utilities often have acquiesced in this reduced ILEC role.

Over the past several years, as the wireline business has contracted,[109] some ILEC joint use partners have gradually disassociated themselves from equitable participation in joint use, relying instead on the electric utility to set most of the poles, obtain necessary permits, provide emergency responses, restore pole lines after storms, police the system and ensure safe operation. During this period, some ILECs have largely refrained from making necessary and appropriate capital improvements to their pole lines. Moreover, many ILECs no longer own equipment necessary to perform work on taller poles. The result, of course, is that electric utilities have been forced by the ILECs to bear the overwhelming burden of joint use.

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[108] Allegheny Power, for example, in 2007 installed 79% of the almost 3,000 new poles that it owns jointly with its ILEC partners.

[109] Arshad Mohammed, *Verizon Loses Land-Line Customers, Profit*, Washington Post at D5 (Aug. 2, 2006).

Although the joint use contracts between some Coalition members and their ILEC partners in many cases do not establish a specific percentage of poles that each party is required to own, they affirm the intention and obligation of both parties to set and own joint use poles. In fact, some agreements do express the intention that the parties strive towards equal ownership. Over the past several years, however, ILECs often have reneged on this obligation, forcing some electric utilities to set and replace up to 90% of all new poles. This gross imbalance has resulted in these electric utilities processing up to *nine times* as many applications for attachment, conducting up to *nine times* as much engineering work, and performing up to *nine times* as much make-ready work to accommodate ILEC attachments than ILECs are required to incur in accommodating electric utility attachments. All of this is occurring in a joint use environment that USTelecom claims is somehow "abusive" to ILECs.

Over the years, the ILECs have dramatically scaled back their joint use programs, all to the detriment of electric utilities. They are not prepared to move quickly, or to respond to emergency situations. They have cut their internal resources supporting joint use and have reduced their joint use staffing. They sometimes use electric utility employees as their default contractors.

Not only have the ILECs been failing to set their fair share of new poles, they have not been transferring their attachments to new facilities in a timely manner when necessary, creating a significant "double wood" problem (whereby two poles unnecessarily stand side-by-side to support all attaching entities). Some Coalition members have been forced by the ILECs to bear a disproportionate amount of the expense required to clear new space and perform routine tree trimming and pole inspections.

In addition, the ILECs have installed far more unauthorized attachments than electric utilities. The ILECs often have failed to submit necessary applications or even notifications for new attachments that are made in the field. This fact may explain in part why some ILECs have resisted efforts by utilities to perform pole audits to determine ownership of attachments and poles. Rather than fully cooperate in such audits, ILECs have refused to participate, refused to pay their fair share of audit costs, refused to accept the results of audits and failed to recognize and be responsible for their fair share of pole ownership and attachments. ILECs are also overloading poles and creating clearance violations.

The ILECs' scaling back of routine joint use maintenance and operations has had serious consequences. For example, Andy Blood, a 25-year-old former lineman for Xcel Energy in Denver, was paralyzed following the collapse of a rotted pole that was owned by Qwest Communications.[110] Mr. Blood was dismantling wooden cross-arms as part of efforts to remove a 50-foot Qwest telephone pole in Adams County, Colorado when the pole broke six inches below the ground, dropping Mr. Blood 25 feet and fracturing his spine.[111] A Denver jury found that Qwest had "willfully and wantonly" failed to properly inspect and repair the pole and ordered Qwest to pay $39 million – $18 million in punitive damages and $21.5 million in compensatory damages.[112] A Denver District Court judge then more than tripled the punitive damages to increase the total award to $84 million after noting that Qwest had failed to inspect, maintain and repair its poles even while the case was pending:

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[110] Andy Vuong, *Judge Triples Qwest Fine for Paralyzed Lineman*, Denver Post, Sept. 6, 2007 (available at http://www.denverpost.com/business/ci_6818622)(last visited March 3, 2008) .

[111] *Id.*

[112] *Id.*; Andrew Oh-Willeke, *Qwest Ordered to Pay $84 Million to Injured Lineman*, Colorado Confidential, Sept. 20, 2007 (available at http://www.coloradoconfidential.org/showDiary.do?diaryId=2782)(last visited March 3, 2008).

> [Qwest] continued the behavior or repeated the action which is the subject of this litigation (failure to inspect, maintain, and repair its poles) during the pendency of this case and that such behavior posed a substantial risk of harm to Plaintiff's or another person or persons. The magnitude of the potential harm to others during the pendency of the case justifies the increase of exemplary damages to an amount equal to three times the actual damages awarded by the jury in this case.[113]

In sum, ironically, it is the ILECs -- not the electric utilities as claimed by USTelecom—which have been shirking their joint use responsibilities. Having no regard for the unfair burden they already have placed on their electric utility joint use partners, the ILECs now seek to abandon the entire joint use concept altogether by asking the Commission to confer phantom pole attachment rights upon them. This request should be rejected outright.

Coalition members can ill afford to bear additional ILEC expenses, nor should they be required to do so. Joint use is the responsibility of all pole owners, not just electric utilities. The rates that electric utilities may charge its business and retail customers are regulated. As a result, electric utilities cannot simply recover all expenses by blithely passing them along to ratepayers. At the same time, electric utility regulators have focused increasingly on the reliability of electric distribution systems. Electric utilities, therefore, must improve and maintain their electric distribution system at the same time that their ILEC partners routinely neglect their joint use duties and require electric utilities to bear a far greater share of joint use expenses.

The Commission would be ill advised to adopt USTelecom's recommendations. ILECs already are failing to comply with existing joint use arrangements. It is the electric utilities that need relief from ILEC abuses, not the other way around.

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[113] *Blood, Andrew et al v. Qwest Serv. Corp.*, Case No. 2005-CV-6972 (Denver Dist. Ct. Sept. 4, 2007)(Attached hereto as Exhibit B). See also, Andy Vuong, *Judge Triples Qwest Fine for Paralyzed Lineman*, Denver Post, Sept. 6, 2007 (available at http://www.denverpost.com/business/ci_6818622)(last visited March 3, 2008).

5. One-Sided Attachment Rights for ILECs Would Undercut Utility Access to ILEC Poles

While USTelecom urges the Commission to grant pole attachment rights to ILECs on utility poles, it remains completely silent on the issue of access by electric utilities to ILEC poles. If ILECs were granted pole attachment rights on electric utility poles, it would create a one-way street by guaranteeing regulated rates, terms and conditions to ILECs for access to electric utility poles, but would confer no parallel rights on electric utilities with respect to ILEC-owned poles. Electric utilities would be left to fend for themselves in their attempts to gain much needed access to ILEC-owned poles. Electric utilities would be placed in an untenable position, since bargaining power no longer would be equal.

Because electric utilities are vitally dependent upon ILECs for access to a great number of ILEC poles, this disparity in pole attachment rights would provide the ILECs with enormous, unfair leverage. ILECs could restrict electric utility access to ILEC poles and demand that electric utilities pay outrageously high attachment rates and other fees. They could require electric utilities to set all new poles, replace ILEC poles, maintain ILEC facilities, monitor and correct ILEC safety violations, surrender space needed for electric attachments, and otherwise hinder the ability of electric utilities to provide service to their customers in a safe and reliable manner.

6. The Pole Attachment Act Prohibits the Commission From Mandating ILEC Attachment Rates

The Commission has requested comment regarding its authority to regulate pole attachment rates for ILECs.[114] The Commission, in fact, lacks statutory authority to regulate joint use rates.

[114] NPRM at ¶¶ 8, 13.

The USTelecom Petition rests on the mistaken notion that Congress, at the time that it enacted the Telecommunications Act of 1996, intended to draw some indelibly fine, hitherto undiscovered distinction between the terms "telecommunications carrier" and "provider of telecommunications services." Claiming that providers of telecommunications services are not *really* telecommunications carriers, the Petition seeks to persuade the Commission that Congress intended to confer different rights and obligations upon the two different entities within the context of pole attachments.

This self-serving notion is contrary to the language of the Act, the legislative history of the Act, the FCC's interpretation of the Act, and the ILECs' own interpretation of the Act for more than a decade. It also defies common sense. As has been clear to everyone for the past twelve years, Congress used the two terms interchangeably and intended that they be treated as synonyms. ILECs are not entitled to government mandated pole attachment rates.

USTelecom's attempt to explain that Congress somehow intended to treat "telecommunications carriers" differently than "providers of telecommunications services" is belied by the clear, unequivocal language of the statute itself:

> The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.[115]

The term "telecommunications carrier," therefore, is defined in the Communications Act as *"any provider of telecommunications services"* (except for aggregators of telecommunications

services). An entity, therefore, cannot be a provider of telecommunications services without also being a telecommunications carrier. Except in the limited case where an entity qualifies as an aggregator of telecommunications services, the two phrases are absolutely synonymous.

ILECs are not aggregators of telecommunications services; that phrase applies only to Section 226 of the Act (Telephone Operator Services),[116] which has no bearing on the pole attachment provisions of Section 224. For pole attachment purposes, therefore, the terms "telecommunications carrier" and "provider of telecommunications services" are synonyms.[117]

USTelecom asserts that Congress did *not* intend to grant ILECs any rights to attach to electric distribution poles but *did* intend to grant ILECs full rights to insist on regulated rates, terms and conditions for such attachments. Had Congress intended such an bizarre anomaly, it is safe to assume that some explanation (or even passing recognition) of it would have occurred in the legislative history of the 1996 Act. But no such explanation exists. Instead, Congress unequivocally defined "telecommunications carriers" as "providers of telecommunications services" and specifically exempted them from the panoply of pole attachment rights conferred on CLECs and cable companies.

Similarly, it makes little sense that Congress granted ILECs rights to regulated pole attachment rates but failed to "drop the other shoe" by specifying an applicable rate. Section 224 provides the rates for cable-only attachments and for attachments by "telecommunications

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[115] 47 U.S.C. § 153(44).

[116] 47 U.S.C. § 226.

[117] The fact that Congress used these terms interchangeably is evidenced by Senate Bill S. 652, which used the term "telecommunications carriers," and included within that term cable television systems which specified that the Commission must ensure that utilities charge just, reasonable and nondiscriminatory rates to "telecommunications carriers," and included within that term cable television systems which "provide telecommunications services." Certain cable systems, therefore, which are "providers of telecommunications services" were also considered to be "telecommunications carriers" that were entitled to regulated rates. *See* S. Rep. No. 104-23, at 40, 86-87 (1995).

carriers," but not for attachments by ILECs or "providers of telecommunications services." Neglecting to specify such a rate would have been a glaring omission indeed, yet Congress did even not recognize such an omission, much less explain it.

Another unexplained oddity is that, in USTelecom's view, the FCC was granted jurisdiction to regulate attachments by ILECs *to their own poles*. Section 224 defines a "pole attachment" as an attachment by a "provider of telecommunications services" to poles, ducts, conduits or rights-of-way owned or controlled by a "utility."[118] The term "utility" is defined to include ILECs.[119] Accordingly, USTelecom's unique interpretation of Section 224 requires the Commission to regulate ILEC attachments to their own poles. Once again, this oddity is not recognized in any way let alone explained by Congress.

The fact that USTelecom's interpretation of ILEC pole attachment rights defies the language of the statute and makes little sense in any context may explain why no ILEC or other interested party raised this far-fetched theory at any other time since enactment of the 1996 Telecommunications Act. In August 1996, the FCC promulgated regulations to implement the 1996 Telecommunications Act.[120] Those regulations extended pole attachment rights to "telecommunications carriers" only. The phrase "provider of telecommunications services" is not mentioned in the regulations at all.[121] When promulgating these regulations, it understandably never occurred to the Commission that a distinction should be drawn between the two phrases, since Congress never drew any such distinction in the statute nor did the ILECs

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[118] 47 U.S.C. § 224(a)(4).

[119] 47 U.S.C. § 224(a)(1).

[120] Implementation of Section 703 of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 9541 (1996) ("August 1996 Report and Order").

[121] *See* 47 C.F.R. §§ 1.1401 *et seq*.

raise it at the time. In fact, the Commission believed its regulations to be so non-controversial that it decided that they were self-implementing and that proposed rules were unnecessary.[122]

Because the Commission's regulations employ only the phrase "telecommunications carrier," they draw no distinction between "access" granted to "telecommunications carriers" and "regulated rates, terms and conditions" granted to "providers of telecommunications services." Section 1.1401, for instance, combines the two different rights and grants them to "telecommunications carriers" by stating that the rules are designed "to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable."[123]

The Commission's entire pole attachment complaint process is open only to "telecommunications carriers" without any mention whatsoever of "providers of telecommunications services." Section 1.1402(d), for example, defines "complaint" as the filing by "a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or any association of telecommunications carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable."[124] Section 1.1404(d)(1) provides that "[t]he complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility."[125] And section 1.1404(d)(2) provides that the

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[122] August 1996 Report and Order at ¶ 2 ("We are revising these rules without providing prior public notice and an opportunity for comment because the rule modifications do not involve discretionary action on the part of the Commission but rather, simply conform our rules to the applicable provisions of the 1996 Act.").

[123] 47 C.F.R. § 1.1401.

[124] 47 C.F.R. § 1.1402(d).

[125] 47 C.F.R. § 1.1404(d)(1).

complaint should be accompanied by a "statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits or rights-of-way."[126] Throughout Title 47 of the Code of Federal Regulations, no FCC pole attachment rules grant any unique rights to "providers of telecommunications services."

Although twelve years ago the FCC's regulations clearly granted pole attachment rights only to "telecommunications carriers" without mentioning "providers of telecommunications services," not a single reconsideration of these regulations was requested by USTelecom or any ILEC. This omission is telling; the silence is deafening.

One would certainly think that USTelecom or an individual ILEC whose pole attachment rights had been completely abrogated by the FCC would at least have sought prompt reconsideration of the FCC's regulations since, as USTelecom now explains, they were so far off base from what Congress actually had intended. The fact that they did not is clear and convincing evidence that neither USTelecom nor any ILEC ever believed that ILECs had any such rights. USTelecom's Petition, therefore, is a patently insincere, recent concoction by the ILECs' national trade association to rewrite the statute as well as the FCC's implementation of it.[127]

USTelecom claims repeatedly that Congress desired to constrain "utilities" from imposing unreasonable rates, terms and conditions,[128] but forgets that Congress expressly included ILECs in the definition of "utilities" under Section 224.[129] In that way, Congress

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[126] 47 C.F.R. § 1.1404(d)(2).

[127] No member of Congress voiced any objection to the FCC's regulations. Certainly, if Congress intended the FCC to grant pole attachment rights to ILECs, the FCC's elimination of those rights would have caused an uproar.

[128] Petition at 4-5, 10.

[129] 47 U.S.C. § 224(a)(1).

recognized that ILEC pole owners and electric utility pole owners were similarly situated for pole attachment purposes. Congress viewed all utility pole owners, electric utilities and ILECs alike, as having the potential to abuse their positions by denying access to attachers, charging unreasonable rates or imposing unreasonable terms and conditions. Indeed, the potential for abuse by "monopoly" pole owners appears to have been the prime motivation for the entire statutory pole attachment program.[130]

7. Commission Jurisdiction Over Rates and Other Aspects of Joint Use Would Require a Grant of Authority by Congress.

USTelecom's Petition appears to be motivated in large part by the ILECs' competitive concerns that they cannot enjoy the benefits of regulated pole attachment rates, terms and conditions, as do CLECs. USTelecom ignores the fact, however, that ILECs and CLECs are different entities and hold different competitive positions.

Unlike ILECs, CLECs do not own their own distribution poles. CLECs, in fact, do not own many of the other facilities that ILECs own that are necessary for CLEC operations, such as local loops, local and tandem switches, interoffice transmission facilities, network interface devices, signaling and call-related database facilities, operations support systems functions, and operator and directory assistance facilities. For that reason, the FCC required ILECs to grant CLECs nondiscriminatory access to these network elements on an unbundled basis.[131] In that

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[130] *Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 (citing S. Rep. No. 95-580 at 121, 95th Cong., 1st Sess. (1977), reprinted in 1978 U.S.C.C.A.N. 109); *see also FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987) (recognizing that Congress enacted the Pole Attachment At "as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service.").

[131] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499 (Aug. 8, 1996).

sense, ILEC-owned distribution poles are no different than the other ILEC facilities that are made available to CLECs.

That being said, if USTelecom believes that existing pole attachment regulations place them at a disadvantage with respect to CLECs and cable companies, the solution is to require the CLECs and cable companies to pay for their fair share of the costs of owning and maintaining the ILEC and electric utility distribution systems, not to make a bad situation worse by granting ILECs pole attachment rights similar to CLECs and cable companies. CLECs, cable companies and other attachers do not bear the expense of setting and maintaining poles, but nevertheless enjoy full use of these poles to provide service to their customers. Because CLECs and cable companies do not need to build their own pole distribution systems, they save an enormous amount of money by relying on their government-guaranteed access to and use of the pole distribution systems of others. It would not be unreasonable to require them to pay a more appropriate share of the costs for one of the key components of their networks: their pole distribution system.

Instead, the burden of owning and maintaining the pole distribution systems on which CLECs and cable operators depend falls in large part on electric utilities and ILECs. This burden already has increased considerably for electric utilities in recent years as some ILECs have failed to pay their fair share and pull their own weight in a joint use environment. Rather than imposing additional one-sided requirements on electric utilities, a better way of reversing these inequities is to require all attachers to pay a more equitable share of pole costs. Such a division of pole costs would recognize the value of the pole distribution system to each of the attachers, and require each of them to pay for a share of the costs based on that value.

Because the Pole Attachment Act does not grant the Commission authority to modify pole attachment rates in a more equitable manner, Congress must amend the Act to permit fairer, more equitable rates. Such Congressional action is much needed, and preferable to the self-serving relief sought by USTelecom, which would simply transfer more ILEC responsibilities to electric utilities.

8. Joint Use Should Continue to be Subject to Negotiated Rates

The Commission seeks comment on USTelecom's suggestion that the default rate for ILECs should be the telecom rate.[132] As discussed above, there is no "default rate" under Joint Use. The Commission has no statutory authority to mandate Joint Use rates.

Since Joint Use rates have been negotiated in a free market for many decades, the Commission should refrain from interfering with the process. If, despite the lack of statutory authority, Joint Use rates are imposed by the Commission, then the Maine, Delaware, Indiana or Washington State Court rates discussed above, which recognize and incorporate the costs avoided by attachers, should be employed.

ILEC rates and access to electric owned poles is one of many key provisions in a negotiated agreement that defines the current longstanding relationship between utility companies. To impose a change to one provision without consideration to the entire arrangement clearly would create an imbalance not contemplated in the contract.

The existing electric utility/ILEC relationship, developed by mutual agreement of the parties over a century of shared use, is based on sharing the benefits and obligations of pole ownership. Although each existing relationship is different, having developed over time to address local issues, existing agreements in general contemplate the sharing pole costs and work

[132] NPRM at ¶ 13.

responsibilities, including pole sets and maintenance, permitting, tree trimming, rights-of-way and administration. If an ILEC were to receive a lower, regulated-rate than what it currently pays, the negotiated balance defined within the agreement – as well as the existing electric utility/ILEC joint use and ownership relationship itself – would be undermined and effectively destroyed.

Why own a pole at all when the electric company must make space available at a small fraction of the cost of ownership? ILECs would likely abandon joint ownership of poles in favor of attachments under subsidized rates. The electric utility would see an immediate increase in its capital costs for poles of 80 to 100%, with only minimal revenue increases.

Over the long-term, virtually all poles may well be converted to sole ownership by the electric utility. Pole attachment revenues from ILECs would increase but clearly would not offset the utility's increased costs of pole ownership.

Furthermore, and presumably dispositive of the issue, if ILECs were to receive government mandated rates pursuant to USTelecom's strained reading of the Pole Attachment Act, the attachment rates for Electric Utilities – the ILECs' joint use partners for decades – would be left unregulated. Eliminating ILECs from a negotiated rate, while continuing to subject Electric Utilities to an "open marketplace," would upset the balance negotiated with respect to the multitude of issues contained within the Joint Ownership and Joint Use agreements and undoubtedly result in rapidly escalating rates for electrics with no end in sight. ILECs would be protected; electric utilities would not. What is currently a longstanding, well-defined working relationship between ILECs and electric companies would be voided.

The FCC is ill equipped to make any determinations regarding the many issues raised above regarding the complex interrelationships between pole owners. A much more expansive

proceeding would be required to support any FCC rulemaking regarding allocation of pole ownership, costs and responsibilities, liabilities, etc.

In addition, many states already have jurisdiction over joint use/joint ownership agreements, so that any disputes regarding the proper implementation of those agreements can be resolved by State Public Utility Commissions. As a result, any proposal to allow the FCC to regulate this relationship risks creation of unworkable competing regulatory schemes.

C. RAMPANT UNAUTHORIZED ATTACHMENT AND SAFETY VIOLATION ABUSES BY COMMUNICATIONS ATTACHERS MUST BE CONTAINED

The Commission seeks comment on attacher practices that have the potential to adversely impact the safety and reliability of the electric power system, and on the prevalence of unauthorized attachments. NPRM at ¶ 38. The Commission also asks whether its existing enforcement mechanisms are sufficient to address improper attachments and ensure the safety and reliability of critical electric infrastructure, and questions whether safety codes, such as the NESC, should apply to all attachers. NPRM at ¶ 38.

1. The Safe and Efficient Operation of Electric Distribution Systems Should Be of Paramount Concern to Attachers

For almost 100 years, during most of which cable companies and CLECs were not yet invented, electric utilities and ILECs worked together to construct an aerial pole distribution system to deliver both electric and telephone service. Decades of work to develop good engineering practices and safety codes and cooperative efforts by both ILECs and electric utilities, have resulted in a multi-million mile system that is both safe and efficient.

a. The Competitive Environment for Communications Services has Compromised the Safety and Reliability of Electric Distribution Systems

Today, competitive dynamics exist that challenge the safe and efficient distribution of electricity over poles. Cable companies, CLECs and ILECs all compete for telephone and Internet customers, while cable companies and ILECs (and satellite providers) now compete for video customers as well. In today's competitive environment, speed to market and cutting costs are driving the rollout of new communication services, which has in effect compromised utility and communications worker safety, electric system reliability and the efficient operation of electric distribution systems.

Construction crews hired by cable companies and telephone companies are often paid to string cables over utility poles in a manner that rewards speed but not safety. The faster they string cable, the more they get paid. They often appear to be poorly trained with respect to NESC compliance and take shortcuts that make their jobs easier but do not conform with established safety and construction practices. Unlike electric companies, many cable companies, CLECs and emerging telecommunication service providers do not have established safety programs and staffed engineering and safety departments. Little to no oversight of contracted work is not unusual.

As a result, Coalition members have encountered countless NESC clearance violations caused by attachers, improper pole guying, ungrounded messenger wires and other equipment, excessive overlashing, improper use of boxing and extension arms, improper installation of equipment, improper hole drilling, the displacement and damage of utility equipment, customer outages, and a host of additional safety violations and poor construction practices.

In short, the contractors hired by cable companies, CLECs and ILECs cannot be depended upon to keep the electric distribution system operating safely and reliably.

b. Unauthorized Attachments by Communications Attachers Are Widespread and Dangerous

Safety violations often are associated with attachments that are unauthorized and unknown to the pole owner. These unauthorized attachments create a significant hazard for electric utility systems because they are subject to none of the usual utility oversight.

Upon receiving an attachment application, utility pole owners pre-inspect facilities to determine whether (i) the new attachments will interfere with existing facilities, (ii) existing attachments must be moved in order to provide adequate clearances, (iii) the pole can withstand the additional "load" created by the new attachments, (iv) the pole must be replaced ("changed-out") to accommodate the new attachments, and (v) additional NESC and utility construction standards are being met. Following this analysis, an estimate is given to the applicant that explains all of the actions that must be taken by the pole owner to make the pole ready for the new attachments. Only upon completion of this "make-ready" work is the attacher permitted to install its facilities. Finally, utilities often perform a "post-inspection" to determine whether the attachers have installed their facilities correctly.

None of these safeguards can be performed if an attacher takes it upon itself to place attachments on poles without going through the permit application process. By making unauthorized attachments, attachers can place attachments wherever they like on the poles with no regard for pole loading, ice and wind loading, clearance issues, compliance with utility operational requirements, NESC compliance, or any other constraint. In addition, of course, unauthorized attachments also manage to avoid being subject to annual attachment fees.

The temptation of communications attachers to neglect (or purposefully avoid) the permit application process has historically been strong. The problem is acute and significantly compromises electric system safety and reliability. Unauthorized attachments avoid make-ready costs and prevent pole owners from collecting annual rentals. Importantly, it is not only pole owners that are harmed by this unlawful practice – ethical, compliant, communications attachers can also have their attachments endangered and/or rendered non-compliant.[133]

An audit performed in 2002 by Toledo Edison (a FirstEnergy operating company) found a 29% unauthorized attachment rate for telephone attachments, and a 33% unauthorized attachment rate for cable companies. A 2004 through 2007 system-wide audit (800,000 poles) performed by National Grid in New York resulted in a 45.1% increase in billable cable and telephone attachments.

These audits demonstrate that unauthorized attachments are rampant and that existing enforcement mechanisms are inadequate to ensure that attaching entities comply with the permit application process that is critical to the safety and reliability of electric distribution systems.

c. Electric Utilities Are Often Required to Perform Work That Attachers Are Supposed to Perform

Not only are communications attachers responsible for unacceptable levels of safety violations and unauthorized attachments, they often fail to perform certain duties that they are required to perform under pole attachment agreements, such as correcting safety violations, rearranging their facilities to accommodate new attachers, transferring their facilities to replacement poles as needed, and removing attachments when required. In such cases, electric

[133] Attachers not only fail to notify utility pole owners of their attachment activity, they often fail even to notify electric utilities when their systems change owners. This lapse has occurred despite specific contractual obligations to execute assignment agreements. Pole owners sometimes find out about the transfer only when their annual rental or other bills are returned.

utility pole owners are forced to perform those tasks, regardless of any strain that may be imposed on utility workforces. In these instances, electric utilities have become *de facto* contractors for communications attachers.

d. Sanctions Are Required to Encourage Attachers to Act Responsibly

The FCC has issued no guidance as to whether utilities are entitled to charge penalties for safety violations, and none of the Coalition Members currently assess any such penalties. As a result, utilities lack a "stick" necessary to enforce compliance with safety and other requirements. In effect, there is an inherent incentive to "short-cut" proper reviews and construction procedures, thus avoiding certain costs. At best, the offending party pays only the cost to bring the safety issue(s) into compliance, and only if and when such non-compliance is identified and corrective action is required by the utility.

As for unauthorized attachments, most Coalition Members follow the FCC's guidance in the *Mile Hi Cable* order,[134] which permits the utility to recover unpaid rentals on unauthorized attachments for five years or from the date of the last audit, whichever is less.

The ruling in *Mile Hi Cable*, however, does not allow utilities to impose penalties to help prevent unauthorized attachments. Instead, the amount specified in that order actually *encourages* attachers to continue making unauthorized attachments because the worst that can happen to attachers if they get caught is that they will be required to pay the rentals that they would have been required to pay in the first instance. Since many times they are not caught, it often "pays" to make unauthorized attachments.

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[134] *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colorado*, 14 FCC Rcd 3244 (1999).

Many attachers have been abusing the pole attachment and joint use processes, and utilities have been unable to stop them. Attacher abuses endanger the public, jeopardize the reliability of electric distribution systems (including all other attachers' operations), waste precious utility resources by diverting them from core electric service activities, and cause utilities to under-recover for rental payments that have historically been unreasonably low to begin with.

To ensure the safety and reliability of electric distribution systems and to help remedy prior abuses by attaching entities, the Coalition of Concerned Utilities requests that the Commission to confirm that the following requirements may be imposed by electric utility pole owners.

Safety Codes. The Commission should allow electric utilities to require attachers to comply with industry standard safety and operational guidelines, such as the NESC, the National Electrical Code ("NEC"), and the Blue Book - Manual of Construction Procedures ("Blue Book"), published by Telcordia Technologies Inc.

Utility Safety and Operational Requirements. Electric utilities should be permitted to require attachers to comply with the utilities' own internal safety and operational requirements, including construction standards. This type of operational discretion properly belongs with utilities, not with attachers or the FCC. Utility safety and operating procedures often supplement safety codes by detailing the specifications that Licensees must follow in order to operate safely in and around the utility's own electric facilities. They include longstanding safety requirements that are specifically tailored to each utility system and provide instructions on how to comport with that utility's standard practices. It is essential for the safe, efficient and reliable operation of

the electric system that attachers comply with each utility's specific operating procedures and requirements.

Inspections. Utilities should be allowed to require attachers to inspect their facilities at regular intervals and to provide an annual certification from an officer of the company that all of their attachments were installed correctly by their contractors and currently comply with NESC and other requirements specified above. In this way, attachers will be required to police themselves and their contractors and remove some of the burden caused by their attachments from electric utilities.

More specifically, attachers should be required to perform code compliance inspections of 20% of their attachments each year, at their own cost. Licensees shall provide to the Pole Owners documentation, attested to by an officer of the Licensee, showing which of their pole attachments have been inspected each year and are safety compliant. Attachers should correct all noncompliant attachments at their own cost, and serious violations should be corrected within ten (10) days of notification.

Unauthorized Attachment Penalties. Utility pole owners should be entitled to impose meaningful penalties to combat the epidemic of unauthorized attachments that many utilities have experienced. In order to avoid disputes relating to unauthorized attachments, these penalties should be adjusted to encourage attachers to comply in any audits conducted by the pole owners. The Coalition of Concerned Utilities proposes that the Commission permit utilities to charge unauthorized attachment sanctions in the following amounts:

- $100 per unauthorized attachment plus 5 years annual rental if an unauthorized attachment is found and the attacher has not participated in a required audit;
- $50 per unauthorized attachment plus 5 years annual rental if the attacher does participate in the audit or identifies the unauthorized attachment on its own.

These sanctions are not unreasonable, since they simply encourage attachers to comply with the critically important permit application process, which they should be complying with in the first place as a matter of course. They are also consistent with the unauthorized attachment sanction provisions currently in effect in the State of Oregon.[135]

Oregon's sanctions provisions have been highly effective in nearly eliminating altogether the large numbers of unauthorized attachments in that State. Portland General Electric, for example, experienced an extraordinary drop in the rate of unauthorized attachments from 30% to 1% following its imposition of unauthorized attachment penalties.[136]

Safety Violation Penalties. the Commission should clarify that utility pole owners may impose penalties for safety violations in the amount of $200 per violation, again consistent with Oregon's rules.[137]

Presumption of Safety Violation. In order to address safety violations that attaching entities do not own up to, utility pole owners should be entitled to establish a rebuttable presumption that an unauthorized attachment that is in violation of a safety requirement is the attachment that caused the violation.

Imposition Costs. Clear and substantive financial disincentives are needed to promote compliance with safety and operational requirements. Non-compliance with these requirements creates safety concerns, un-level playing fields and unintended subsidies.

The Commission should clarify that utility pole owners are entitled to be compensated for the considerable strain imposed on their limited internal resources when they are required to

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[135] Or. Admin. R. § 860-028-0140(2) (2008).

[136] *See* Portland General Electric PowerPoint attached hereto as Exhibit C.

[137] Or. Admin. R. § 860-028-0150(1)-(2) (2008).

perform tasks that attaching entities should have performed but did not, such as correcting safety violations, rearranging facilities to accommodate new attachers, transferring facilities to replacement poles as needed, and removing attachments when required. In order to encourage attachers to do what they are supposed to do and to adequately compensate utility pole owners when they do not, the Coalition of Concerned Utilities urges the Commission to clarify that utilities may charge "Imposition Costs" when they must do work that attachers have neglected to do. These Imposition Costs would be equal to all costs, including the cost of materials and equipment, fully loaded direct and indirect labor, engineering, supervision and overhead, associated with performance by Licensor of certain tasks as specified in this Agreement, plus an additional 50%.

Attacher Oversight. Attachers should be required to provide better oversight of their workers and contractors to ensure that these personnel are qualified to work near electric distribution systems, and understand and comply with the NESC, the Occupational Safety and Health Act, other safety codes, and the utility's own safety and operational specifications. Attachers should be required to prequalify contractors and workers on that basis, create a written program to assure contractor and worker qualifications and training, and provide continuing oversight of those personnel to ensure compliance. Attachers should be required to provide a copy of such written programs available to Pole Owner upon its request, along with information pertaining to its prequalification and oversight activity. Workers or contractors found in violation with these requirements may be prohibited from performing any work until all of the requirements have been met.

D. THE COMMISSION SHOULD NOT ADOPT THE UNSAFE AND UNWORKABLE ACCESS REQUIREMENTS PROPOSED BY FIBERTECH

The Commission asks whether it is appropriate to adopt specific rules, presumptions or guidelines regarding certain non-price terms and conditions associated with section 224 access rights, or is it better to use case-specific adjudication. NPRM at ¶¶ 3, 38. In particular, the Commission seeks comment on the concerns raised in the Fibertech Petition proceeding about the terms and conditions of access to poles. NPRM at ¶ 37.

1. One Size Regulation Does Not Fit All

It makes little sense for the Commission to impose on electric utilities specific rules, presumptions and guidelines relating to access and other non-price terms when such requirements fail to consider the many differences between electric utility pole owners, not to mention the even greater differences between electric utility pole owners and ILEC pole owners. Many of these differences are explained below in the Coalition's responses to individual proposals contained in the Fibertech Petition. The plain fact is that one size regulation does not fit all utility pole owners.

The existing FCC complaint process entitles attachers to seek whatever relief they believe is appropriate on a case-by-case basis. This process makes sense because each access case requires a review of all relevant facts to determine whether the actions taken by either party were unreasonable. Hard and fast rules, presumptions and guidelines ignore the unique operational characteristics of electric utility systems and would allow attachers to violate legitimate and sometimes critical operational constraints. For these reasons, the Commission should not adopt specific rules, presumptions and guidelines to govern non-price terms.

The proposals raised by Fibertech go to the heart of electric utility construction and operation by requiring utilities to expand the use of boxing and extension arms, perform make-ready for attachers on accelerated schedules, allow attachers to hire make-ready contractors, and provide attachers unfettered access to drop poles and utility conduit.

The adoption of any of these proposals as a nationwide standard fails to consider the interests of State Public Utility Commissions, many of which have imposed specific safety and reliability requirements of their own on electric utilities and have a vested interest in ensuring safe and reliable utility operations within their respective states.

Moreover, Fibertech's proposals would require utilities to bend over backwards to accommodate Fibertech when Fibertech itself is experiencing record revenues and profits. Its annual revenues for 2007 were $50 million, almost four times as great as its revenues of $13 million from 2006.[138]

Behind each of these Fibertech proposals is the concept that attachers, not utilities, are in the best position to know how to construct and operate electric utility distribution systems and control how those systems are managed. As explained below, this notion is dangerous and should be rejected.

2. Boxing and Extension Arms Must Be Subject to Rigorous Utility Scrutiny if They Are Allowed at All

Fibertech proposes that utilities be required to permit the use of boxing or extension arms where (1) such techniques avoid pole replacement or make-ready work involving electrical facilities; (2) the facilities on the pole can be safely reached by a ladder or bucket truck; and (3)

[138] Matthew Daneman, Democrat and Chronicle (March 4, 2008) ("We had a really great year, that's the only word for it," explained Fibertech's President and Chief Executive John Purcell.).

the pole owner has previously allowed use of the technique.[139] Speed to market and minimizing costs are the basis of this request.

In the eyes of many utilities, the use of extension arms or boxing of poles undermines good construction practice.[140] This proposal compromises worker safety, system reliability and efficient system operation and as such needs to be reviewed on a case-by-case basis. Fibertech's proposals would result in the widespread use of extension arms or boxing.

Currently, these decisions are made by individual utilities using their own judgment. Neither boxing nor extension arms are permitted by DP&L and KCP&L, and boxing is not permitted by NSTAR and in most FirstEnergy contracts. Other Coalition members permit boxing and extension arms only to a very limited extent (usually less than 5% of the poles) and only after performing the engineering and operational analysis necessary to determine whether permitting an attacher to use extension arms or boxing makes sense.

An additional concern is that a large amount of the boxing and extension arms existing on Coalition member systems have been placed on the poles by attachers without the consent of the pole owner. As a result, while boxing and extension arms may be prohibited by contract, the use of boxing and extension arms historically has been impossible to police or prevent and remains to some extent uncontrolled. While almost intolerable today, the situation will become intolerable in the future if Fibertech's proposals are adopted.

There are good reasons why certain utilities prohibit boxing and extension arms. Both boxing and extension arms make it more difficult and hazardous for climbers to access the pole. Boxing results in two sides of a pole having wire attachments, thereby obstructing the climbing

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[139] In the Matter of Petition for Rulemaking of Fibertech Networks, LLC, RM-11303 (Dec. 7, 2005) p. 13.

[140] Photographs of poles with boxing and/or extensions arms are attached hereto at Exhibit D.

space on the pole. Extension arms extend beyond the vertical space on the pole thus creating a climbing hazard and even raising the possibility that someone falling from a pole could get caught on that extension arm on the way down. These climbing problems are exacerbated during storms and in other inclement weather when it is more likely that poles will be climbed. In addition, because they extend out from the pole, extension arms also make it more difficult for those in bucket trucks to access poles.

Boxing also makes it more difficult to change-out poles. If attachments are located on only one side of a pole, replacing the pole and transferring the attachments is relatively easy, since the new pole can easily be installed next to the one to be replaced. With boxing, however, the new pole must be inserted between the wires on both sides of the existing pole. This procedure is more costly and time consuming, creates safety hazards and risks damaging the communications facilities that are currently attached. This risk is particularly high if the pole to be inserted has a larger diameter than is available in the existing space.

Extension arms cause pole loading concerns too. The cantilever effect of projecting out from the pole results in an extraordinary amount of weight and load being concentrated in a specific area. This concentration is particularly acute when wind and ice loading is factored in.

Finally, boxing can compromise the integrity of a pole if holes are drilled one side of the pole that are too close to the holes on the other.

Given these serious concerns with boxing and extension arms, it is little wonder that some Coalition members prohibit it altogether and others permit it only in limited quantities. To grant an attaching entity global permission to box poles or attach extension arms simply because the utility pole owner has permitted it on other occasions would drastically add to the potential problems identified above. The fact that it is done by some utilities by exception should not be

interpreted to mean that it always will be a responsible or safe method. Pole owners need to retain the discretion to review each pole design and each proposed distribution route to determine whether boxing or extension arms should be allowed in its judgment.

At the very least, the Commission should clarify that pole owners are entitled to prohibit boxing and extension arms altogether going forward, as long as that prohibition is enforced in a nondiscriminatory manner. And cost alone should not be determining factor in deciding whether boxing or extension arms should be permitted. Rather, engineering standards, safety, system reliability and facility access should be determinative.

3. Make-Ready and Contractors

Deciding for itself that the number one priority for the nation's electric utilities should be the timely accommodation of Fibertech's attachments, Fibertech proposes that utility pole owners be required to complete field surveys to identify make-ready within 30 days and complete all make ready within 45 days.[141] If these timeframes cannot be met, Fibertech proposes to allow attachers to hire contractors to perform field surveys and make-ready.[142]

a. Artificial Deadlines for Communications Attacher Requests Improperly Favor Attachers, Ignore the Realities of Utility Operations, and Would be Practically Impossible to Meet

Imposing an artificial timeline makes little sense in the operational world of electric utilities, and a 45-day make ready deadline would be practically impossible to meet.

The problems with artificial deadlines are that every utility is operated differently and no utility can staff adequately for an unknown volume of make-ready engineering or construction. For these reasons, utilities are able to schedule make-ready only after knowing how much make

[141] *Id.* at 17.

[142] *Id.* at 19.

ready is required by the attacher, how much work the utility currently has, and how all of this work can be managed given the other commitments of the utility's plant operations department. Third party attacher make ready requests must be evaluated individually in each case and added to the utility's continual mix of customer, maintenance and system improvement work, all of which needs to be completed in due course.

For example, if an attacher were to submit an application to attach to 200 poles, that single application could identify several months' worth of make ready work. With very large projects, obtaining necessary materials also can cause delay. Although Allegheny is an efficient utility, it took the company approximately one year to build a line into the Whitetail ski resort in Mercersburg, Pennsylvania. Even though the company was able to use a certain amount of existing lines, it needed to special order and replace poles and obtain necessary rights-of-way before the make ready project could be completed.

Field surveys alone for large projects are difficult to complete within 45 days. Field surveys require a detailed analysis of each pole to identify clearance issues, perform wind and ice loading analyses, and evaluate other field-related conditions. Make ready is identified only by completing that field survey, and it is only after completion of the field survey and preparation and acceptance of the make ready estimate, that such make ready work even can be scheduled for completion.

Imposing artificial time limits on field surveys and make ready work also may force utility operations personnel to perform third-party attacher work before the utility's own electric work. There are other realistic ways of addressing attacher concerns that are not detrimental to utility operations.

If scheduling of make ready work is a concern, communications attachers should be required to provide advance notice of where they intend to build out, so that electric utility pole owners can better coordinate staffing. In addition, the number of requests for make ready that may be submitted within a certain period of time must be limited to an amount that is reasonable for the utility to process in light of its many other responsibilities. It may be possible, if acceptable to the utility involved, for attachers to pay overtime to utility workers or contractors who may wish to work weekends, as long as such work does not impede the utility's own operational needs.

A requirement to provide reasonable advance notice is sensible and fair, as is a requirement that overtime pay be offered in those instances where utility operations permit it. Attachers should not be able to create an emergency for new service and then complain that the utility is not acting fast enough to accommodate the emergency.

b. Allowing Attachers to Hire Contractors Would Improperly Favor Attachers, Jeopardize Utility Operations and Increase Contractor Costs

Allowing communications attachers to hire outside contractors to perform field surveys and make ready work that electric utilities cannot perform themselves by artificial deadlines is no solution.

It is critical from an electric utility standpoint that utility pole owners have ultimate control over work done on their poles, including the hiring of contractors to perform make ready work on the poles. Utility work does not occur in a vacuum. Utilities must be able to control the quality of work being completed and the timing of that work, and every job is must be coordinated with all other ongoing efforts. A communications company designing and

[143] 47 U.S.C. § 224(f).

managing electric work is not in any position to supervise work conducted on a utilities' poles or to coordinate an electric utility's other ongoing efforts.

Performing make ready work in the electric space on poles is far more hazardous and complex than installing communications cables outside of the electric space. If attachers were given free rein to hire their own contractors, the contractor selected might be someone with little experience or one with a poor performance record. The contractor may be completely unfamiliar with the utility's construction standards. Such contractors could injure themselves and others, damage the pole, use defective or inferior equipment, and create safety problems for subsequent workers and for the public at large. Even if the contractor's work does not injure anyone, such shoddy work could at the very least require a large amount of rework and expense. Requiring attachers to employ only contractors pre-approved by the utility is helpful, but would not fully resolve the liability issues raised above.

The utility maintains poles long after make ready is completed and must live with the consequences of any work that is not performed correctly. For this reason, it is imperative that make ready contractors be in privity with the pole owner, not with an entity whose primary objective is to get on the pole as quickly as possible.

Another concern is the inevitable disruption that would occur in the labor pool for contractors, which are often in short supply in many areas. If contractors that are certified to do this type of make ready work become less available to utilities because they are being called upon by attachers to do their work first (perhaps at a higher fee), operations could suffer because utilities would have a harder time obtaining the resources needed to complete the work. Utilities would be prevented from meeting their other customer commitments and deadlines.

Moreover, anything that would threaten contractor availability and thus compromise the ability of electric utilities to restore power during emergency conditions would be a significant concern for State regulators.

Another result of a labor shortage would be higher costs for utilities and their ratepayers. With contractors pulled away to do attacher work, the costs that utilities would incur to have their own work completed could significantly increase. This additional cost would be caused by the attachers but the utility would be in no position to recover anything but a fraction of that additional cost from the attachers in the form of annual rental. The remainder of this hidden cost would be borne by the utilities and their ratepayers.

Even with utility-approved contractors, utilities would need to appoint design engineers to review calculations and inspectors to oversee any contractor work. This is needed not only to ensure that work is done safely and in accordance with applicable standards, but also because there are operational matters that may affect a make ready project that only the electric utility itself is in a position to know.

The pole owner is the only entity with information regarding the rights of other attachers, their service needs and the utility's own service needs. Only the pole owner would be aware of municipal public improvement projects or other work that could potentially impact the attacher's proposed work on the pole. For example, the utility may be back feeding a line with a single feed, so that there would be no alternate route for the electricity needed to serve an entire community. The utility knows that work cannot be performed on that line until an alternate route becomes available because it would compromise the sole source of electricity going to the community. That information must be conveyed by the utility to whatever contractors may be interested in performing work on that portion of the system.

The requirement that utility design engineers and inspectors supervise contractor practices raises another timing constraint that would not be solved by allowing communications attachers to hire make ready contractors. Many utilities design engineers and inspectors already are pressed for time. Consequently, even if allowing attachers to hire their own contractors were consistent with utility engineering practices, in many cases it would not help attachers gain faster access to electric distribution systems because attachers still must wait for design engineers and inspectors to be available to oversee and approve the work.

Finally, even if permitted by the statute or by safe engineering practice, some utilities may be parties to collective bargaining agreements or otherwise be constrained by their relationships with unions, which may explicitly prohibit the hiring of outside contractors in certain circumstances, create obligations to confer with the union before "outside contracting" is allowed, or require the payment of overtime to union members when outside contractors are hired. The relationship between some pole owners and their unions have been in place for decades and is critical to pole owners. Any constraints imposed by that relationship must be honored to preserve this working relationship.

4. Drop Poles Require Advance Permitting for the Same Reasons That Permits Are Required for Mainline Distribution Pole Attachments

Fibertech proposes that utility pole owners be required to allow lift/drop pole attachments without prior approval.[145] There is no reason, however, to treat drop pole attachment requests any differently than requests to attach to mainline distribution poles. Drop poles used by electric utilities always support secondary voltage conductors and in certain instances primary voltage conductors. Either is enough to be fatally hazardous to pole workers and to the public.

In addition to primary or secondary conductors, drop poles may include guy wires, grounding, streetlights, transformers, braces and other hardware, all of which pose the same types of hazards to workers and the public as do other electric distribution facilities. Because of this potential hazard, neither the NESC nor OSHA guidelines distinguish between mainline poles and drop poles.

Because drop poles are often much shorter (30 feet) than mainline distribution poles, in some cases the poles may need to be replaced in order to provide proper clearances for attachers other than the initial electric and ILEC attachers.

Under all circumstances, the pole owner should have the opportunity to evaluate the drop pole to determine the extent to which make ready work may be required.

Drop poles should be treated no differently than mainline poles.

5. Manholes and Conduits with Energized Electric Facilities Are Much Different Than ILEC-Owned Facilities

Fibertech proposes that utility conduit owners be required to allow attachers to conduct conduit record searches and manhole surveys.[146] Fibertech proposes to cap at $200 the amount that conduit owners may charge for conduit record searches and manhole surveys.[147] Fibertech would require utility conduit owners to allow attachers to use contractors to work in manholes without utility supervision.[148] Finally, Fibertech would like to require utilities to provide attachers with better access to conduit that enters buildings.[149]

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[145] In the Matter of Petition for Rulemaking of Fibertech Networks, LLC, RM-11303 (Dec. 7, 2005) p. 21.

[146] In the Matter of Petition for Rulemaking of Fibertech Networks, LLC, RM-11303 (Dec. 7, 2005) p. 24.

[147] *Id.* at 30.

[148] *Id.* at 31.

[149] *Id.* at 35.

Any FCC determination on access to electric system underground networks (i.e., conduit, manholes, handholes) must be reviewed separate and distinct from the ILEC underground network. Underground electric facilities are energized; underground ILEC facilities are not. Unlike joint use poles, electric underground networks are physically separate from telephone underground networks. The hazards present in the confined space of the electric manhole are very much different than the concerns present in a telephone manhole. Access to electric manholes is permitted only by OSHA-qualified electric workers.[150] And few, if any, telephone (communications) workers are OSHA-qualified to access an electric manhole.

Fibertech's proposals appear to be directed at ILEC-owned manholes and conduit that do not contain energized electric facilities, and when analyzing any proposed new rules, the Commission should keep in mind this very fundamental difference between energized and non-energized manholes and conduits. The conduit and manholes that are owned by electric utilities are far more hazardous than the conduit owned by ILECs because of the presence of energized electric facilities in electric utility conduit and manholes. Far greater precautions need to be taken when accessing confined spaces like manholes and conduit that are used to conduct electricity.

The NESC does not allow communications and electric facilities to share the same duct, but they are allowed to share the same duct bank.[151] Electric utility duct banks usually have enough ducts to carry electric facilities and then one extra duct. This spare duct must be reserved by the electric utility for service restoration in the event of emergencies, and may also be required to address future electric service needs for a building. In the event of damage to existing electric

[150] 29 C.F.R. § 1910.269.

cable, a spare duct allows the utility to restore service right away, simply by installing new electric cable in the spare duct while it repairs the damaged facilities.

If a communications company were occupying the spare duct, then restoring service following damage to an existing electric cable would be more time consuming and expensive, since the utility would need to pull out its own damaged electric cable and then put in new electric cables. This would increase the expense of correcting the electricity outage and significantly lengthen the duration of the outage. Having communications cables sharing the same conduit also increases the liability of electric utilities if the electric utility were to burn out its own electric facilities, because the communications facilities also could be damaged.

More extensive training is required of anyone entering a manhole containing energized electric facilities, and electric utilities must ensure that whoever enters the manhole is properly trained. Someone lacking proper training to perform manhole surveys could be injured severely or killed.

Because of the liability and safety concerns, utilities must have qualified electrical underground employees present whenever anyone enters enclosed energized facilities like manholes. Without utility supervision, contractors would not know about other utility operations and planning activity affecting the underground electric circuits, or otherwise know the status of electrical circuits, which can change at any time. Inspectors are also needed to make determinations on the spot if conditions prohibit the work from being performed as designed (for example, if a duct is obstructed in a particular section and a different one must be assigned). The

[151] NESC § 320.B.2. In addition to safety considerations, there is the practical reality that heat dissipated from an electric conductor within the same conduit would be detrimental to the communication cable.

presence of third parties in manholes also compromises the integrity of the system because it provides more opportunity for damage to occur.

For these reasons, supervision by electric utilities of manhole access not only makes common sense, it is required by OSHA regulations.[152]

The costs associated with performing manhole surveys and searching conduit records can vary, so that Fibertech's proposal of capping the fee at $200 by no means guarantees that all utility costs would be recovered. Quite the contrary, electric companies cannot roll a two-person truck for less than $200/hr. Manhole access always requires that entry procedures be followed and may require pumping and water test/disposal costs. And all of these costs are incurred before anyone even enters the manhole for the inspection.

Any manhole survey or conduit record search costs that are left unrecovered, of course, must be paid by electric utility ratepayers on behalf of the communications attacher, thus resulting in another hidden tax on ratepayers.

IV. CONCLUSION

The Coalition of Concerned Utilities urges the Commission to exercise caution in modifying an already attacher-friendly pole attachment regulatory regime in an attempt to foster the continued deployment of cable, telecommunications and broadband services via the nation's electric utility distribution poles.

[152] *See* 29 C.F.R. § 1910.146; 29 C.F.R. § 1910.269(e)(1)-(14); 29 C.F.R. § 1910.269(l)(1).

WHEREFORE, THE PREMISES CONSIDERED, the Coalition of Concerned Utilities urges the Commission to act in a manner consistent with the views expressed herein.

Respectfully Submitted,

COALITION OF CONCERNED UTILITIES

Allegheny Power
Baltimore Gas and Electric Co.
Dayton Power and Light Co.
FirstEnergy Corp.
Kansas City Power and Light
National Grid
NSTAR

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EXHIBIT A

EXHIBIT A

COPY TO:

C/PLTF. X C/DEF. X

DATE: 5-20-98

The Honorable J. Kathleen Learned

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

TCI CABLEVISION OF WASHINGTON, INC., a Washington Corporation, Plaintiff, vs. CITY OF SEATTLE, a Washington municipal corporation, Defendant.	No. 97-2-02395-5SEA FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ~~[PROPOSED]~~

I. INTRODUCTION

This case came on for trial without a jury before the above Court on March 16, 1998. Plaintiff, TCI Cablevision of Washington (TCI), was represented by Mark S. Davidson and Judith A. Endejan of Williams Kastner & Gibbs. Defendant, City of Seattle (Seattle), was represented by William H. Patton, Assistant City Attorney.

Plaintiff, TCI, alleged that the rates for pole attachment established by Seattle ordinance for attachment to Seattle City Light poles for the periods 1995-96 and 1997-98 were unjust and unreasonable in violation of RCW 35.21.455(2). Seattle denied these allegations and sought recovery of unpaid pole rental charges, plus interest, from TCI.

ORIGINAL

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Testimony and evidence were presented over seven days of trial from March 16—19 and March 23—25, 1998, with closing arguments made to the Court on March 26, 1998. Plaintiff called the following witnesses: William Bennett (TCI), Douglas Cooper (TCI), Robert Goldstein (Seattle), Paul Glist (Cole, Raywid & Braverman, L.L.P., called as an expert), Paul Croom (Seattle City Light), David Arbaugh (former representative PUD Association), Ron Main (Washington State Cable Communications Association), Jane Soder (Seattle City Light), Matt Lampe (Seattle), Marshall Nelson (Davis Wright Tremaine), Steven Weed (Summit Cable), and Bob Robertson (Electric Lightwave). Defendant called the following witnesses: Jane Soder (Seattle City Light), Betty Tobin (Seattle City Light), Michael Katz (KFA Services, called as an expert), and Councilmember Tina Podlodowski (Seattle). Plaintiff recalled William Bennett (TCI) as a rebuttal witness.

After reviewing the testimony and evidence, the Court ruled in favor of the Defendant, City of Seattle, in an oral ruling delivered on April 14, 1998. A transcript of the Court's oral ruling is attached to these Findings and Conclusions as Exhibit A.

Having considered all testimony and evidence introduced in this trial, the Court makes the following Findings of Fact and Conclusions of Law and enters its Judgment:

II. FINDINGS OF FACT

A. Seattle

1. Seattle owns and operates a municipal electric utility, Seattle City Light, under the general authority of RCW 35.92.050.

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2. Seattle City Light serves customers throughout the City of Seattle, as well as adjacent areas both north and south of Seattle.

3. Seattle City Light owns approximately 93,000 distribution poles in its service area.

4. Approximately 80% of those distribution poles in the Seattle City Light service area are jointly owned by U.S. West.

5. In addition, a small number of the poles are jointly owned by three owners: Seattle City Light, U.S. West and King County Metro.

B. TCI

6. TCI owns and operates a cable television utility service which provides cable television service to subscribers both in and outside the City of Seattle.

7. TCI entered into a new, 10-year cable franchise with Seattle in December 1995, which contained a provision reserving TCI's right to challenge the legality of any actions taken by Seattle.

8. TCI entered the Seattle market in 1986 when it purchased Group W cable, and enlarged its presence in Seattle in 1996 when it purchased Viacom's cable operations.

9. TCI is now the largest cable television service provider in Seattle, with approximately 135,000 subscribers in Seattle and approximately 40,000 additional subscribers in areas served by Seattle City Light outside of Seattle.

10. Summit is the next largest cable service provider in Seattle, with approximately 12,000 subscribers.

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11. TCI provides cable service in the Seattle City Light service area, both within and outside the Seattle City limits, by attaching both coaxial and fiber optic cable to Seattle City Light poles, except in areas where underground service is provided by all utilities.

12. TCI is by far the largest renter of attachment space on Seattle City Light poles, attaching its cable to approximately 59,000 Seattle City Light distribution poles.

C. Standard Distribution Pole

13. The standard height of a Seattle City Light distribution pole prior to the arrival of cable television was a 45 foot pole.

14. After cable television service began to spread in Seattle, however, Seattle City Light began to install 47 foot poles as the standard, in order to accommodate the space needs of cable television attachments.

15. The standard height of a Seattle City Light distribution pole is now a 47 foot pole.

16. The standard pole configuration on a 47-foot Seattle City Light distribution pole from the base up is as follows: Support space -- 27 feet (7 feet underground; 20 feet from the ground to the first attachment); Telephone attachment -- 2 feet; Cable attachment -- 1 foot; Safety clearance zone -- 4 feet; Electric attachment --13 feet.

D. Pole Ownership v. Pole Rental

17. Prior to advent of cable television service in Seattle in the late 1960's and 1970's the model for sharing space on poles was an ownership model.

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18. After Seattle acquired the distribution properties of Puget Sound Power and Light in 1951, Seattle and the telephone utility increasingly agreed to joint ownership of poles, both to share expenses and to decrease aspects of urban blight caused by multiple sets of poles on the same street.

19. When Metro rewired the trolley system in the late 1970's, Metro likewise purchased an ownership share in the Seattle City Light and U.S. West poles to which it attached overhead trolley cables.

20. When cable television began to provide service in Seattle, however, Seattle City Light agreed to rent space on its poles rather than require the new cable television operators to purchase ownership shares in each of the poles to which they attached cable.

E. Pole Attachment Rental Rates -- Background

21. Pole attachment fees were originally established by Seattle City Light, through administrative action, under rule making authority delegated from the Seattle City Council.

22. When Seattle City Light raised the pole attachment fee in the mid-1980's, the cable television companies refused to pay the higher rate, and litigation between Seattle and the cable companies resulted.

23. The lawsuit between Seattle and the cable companies was settled in 1988 when the cable companies and Seattle City Light entered into an eight-year pole attachment contract, which provided for specified rates for attachment, and which also provided for automatic renewal for another eight years, unless one of the parties terminated the contract at least 180 days before its expiration.

24. Seattle City Light on October 30, 1995, formally notified TCI in writing that its pole attachment contract would be terminated at the end of the eight-year term in April 1996.

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25. The initial rates set out in the contract with TCI and other cable companies under similar contracts for attachments were $6.00/pole/year for a pole owned solely by Seattle City Light and $2.00/pole/year for jointly owned poles.

26. The rates for attachment under the contract with TCI when it was terminated in April 1996 were $6.24/pole/year for a pole owned solely by Seattle City Light and $2.80/pole/year for jointly owned poles.

27. In 1992, Seattle City Light, by administrative action, refused to act on a pole attachment application from Electric Lightwave, Inc. (ELI) and, instead, adopted a pole attachment moratorium in order to reassess its pole attachment policies in light of an anticipated increase in demand for pole attachment space from newly forming telecommunication companies.

28. ELI then sued Seattle in King County Superior Court Cause No. 92-2-07956-9, seeking a writ of mandamus to allow ELI to attach to Seattle City Light poles on the same basis as others had been permitted to do so.

29. Judge Steven Scott of the King County Superior Court issued a writ of mandamus to allow the proposed ELI attachment, unless Seattle provided reasons for its refusal other than an administrative policy review, or unless Seattle enacted a moratorium by legislative action in order to consider a change in pole attachment policy.

30. Following Judge Scott's ruling in the ELI case, Seattle enacted a pole attachment moratorium by legislative action in July 1992, in order to consider a comprehensive pole attachment policy.

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31. The moratorium did not affect the ability of TCI and other cable companies to continue to attach to Seattle City Light poles, since they continued to operate under the 1988 pole attachment contract with Seattle City Light.

32. During the pole attachment moratorium, Seattle representatives held a number of meetings with interested parties, including TCI, to discuss proposed revised pole attachment policies.

33. One of the policies proposed by Seattle, to which TCI specifically objected, was the proposal to set pole attachment rates in the future by ordinance.

34. Following a nine-month moratorium on pole attachments, Seattle enacted a revised pole attachment policy by ordinance in April 1993 by amending Seattle Municipal Code (SMC) Chapter 15.32. to include a new section, SMC §15.32.300, setting forth terms and conditions for attachment to City-owned poles.

35. Seattle provided in SMC §15.32.300(A) that the City would reserve one communication space on City-owned poles for its own use.

36. The newly adopted pole attachment policy specifically provided in SMC § 15.32.300(B)(3)(n) that the rates for pole attachment will be set by ordinance.

F. Pole Attachment Rate Task Force

37. Following the adoption of SMC § 15.32.300(B)(3)(n), Seattle established a pole attachment rate task force to develop rate proposals for consideration by the City Council in eventually enacting pole attachment rates by ordinance.

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38. The pole attachment rate task force consisted of Jane Soder and Robert Goldstein, both of whom testified in the case, and Solomon Tadesse, who did not appear as a witness.

39. The task force members, in particular the two members who testified, had the background, experience and training that were appropriate and sufficient to the task that they were given.

40. The two task force members who testified appeared to be fully technically competent to analyze and evaluate the issues that were presented in pole attachment rates.

41. The three-person task force did a detailed work-up and background research.

42. The task force members were intelligent, responsible and diligent in their work.

43. The task force worked over a two-year period gathering information on the methodology to be used.

44. The task force considered up to 12 different methodologies.

45. The task force considered different rates from around the country, and it was fully aware of rates around the country from a high of $25/pole/year to only a few dollars.

46. The task force was also fully informed regarding the FCC methodology.

47. The task force knew that the initial $14.66/pole/year rate which it proposed for a pole solely owned by Seattle City Light would be at the high end of rates around the country.

48. The task force had a reasonable belief that many rates did not reflect a cost accounting methodology, but other issues, such as policy considerations, politics and inertia.

49. The task force also had a reasonable belief that some other areas had wanted to raise their rates, but had not done so in some time.

50. The task force was motivated to find the most accurate way to have all users share in the costs of the poles and to return the cost to the City.

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51. The task force was not motivated to generate excess revenue or to stymie competition or to adversely impact attachers. [1]

52. The task force did not solicit input from the cable companies prior to passage of the 1995 rate ordinance, but assumed that the cable companies would not be happy about an increase in rates.

53. The fact that the task force did not solicit information from cable companies did not deprive it of significant factual data and information in its background research.

54. The task force had identified the key variables in the pole rates.

55. The task force knew that the pole use ratio was a key variable, and knowingly and purposefully varied the pole use ratio from the FCC format.

G. Allocation Methodologies

56. The FCC formula for pole use ratio adopts a pro rata method of allocation by allocating costs of the entire pole in proportion to an attacher's "direct" use of space on the pole as compared with the total amount of "direct" space occupied by all attachers.

57. The task force use a pole use ratio based on a per capita allocation of the support and safety clearance space, in addition to each attacher's amount of "direct" space occupied.

58. The task force understood that the rental rate it ultimately proposed was still cheaper to cable attachers than actual ownership or joint or co-ownership of existing poles, or than the expense of cable operators building their own poles.

59. The task force also took account of the fact that Congress was apparently thinking about going to a per capita pole use ratio at the time the 1995 rate ordinance was adopted.

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60. The task force knew exactly what it was doing regarding three issues focused on during trial: (1) the support space; (2) the four-foot safety zone; and (3) the FERC "sub account 369.1" issue.

61. Accordingly, it was not due to a lack of information or confusion which led the task force to make the choices it did on each of those three issues.

62. The task force specifically rejected incremental costs or a pro-rata rationale to allocate costs, on the assumption that this would not reflect a return of capital.

63. The task force chose a full cost rate based on accepted cost accounting methodology that identified benefits and costs.

I. Support Space

64. On the issue of support space, the task force chose to allocate the support space (7 feet below ground and 20 feet above ground to the first attachment) equally among the three attachments (electric, telephone and cable) which it found to be the average number of attachments on each pole.

65. The task force recommended a rationale for allocating the support space which it believed to be fair, based on the rationale that there was no relationship between the amount of space used above the point of first attachment at 20 feet and the amount of support space below (20 feet from the first attachment to the ground, and 7 feet support below ground).

J. Safety Clearance

66. In respect to the 4-foot safety clearance zone, the task force also recommended that that space be similarly allocated on a per capita basis based on the average of three attachments per pole.

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67. If there were only telecommunication attachments and cable attachments to the pole or only electric attachments then there would be no need for a safety clearance zone.

68. The primary reason for requiring the four foot safety zone is to protect the safety of workers who are not Seattle City Light trained line workers.

69. Secondarily, the safety zone protects the telephone and cable lines from damage when City Light workers are working on the electric system with bucket trucks.

70. Thirdly, the safety zone also provides convenience for the Seattle City Light electric workers who are less likely to get tangled up with communication wires when they work on the electric system.

K. FERC Sub-account 369.1

71. In determining maintenance costs as a percentage of assets, the task force used FERC sub-account 369.1 in the denominator rather than FERC account 369, because this sub-account contains assets of only overhead services, whereas account 369 also includes assets for underground services.

72. Using sub-account 369.1 as the denominator is consistent with the task force's use of FERC account 593, which contains only overhead system maintenance expenses, as the numerator in determining maintenance costs as a percentage of assets.

73. This treatment of FERC accounts is different from the treatment of those accounts by the FCC, in that the FCC uses the entire FERC account 369 in the denominator, regardless of the existence of underground services in the particular electric utility under review.

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74. The task force consciously chose to use only FERC sub account 369.1 to be consistent with the Seattle City Light's mix of underground and overhead services and to be consistent with the data for only overhead maintenance included within FERC account 593 used in the numerator.

L. 1995 Rate Process

75. The work of the task force led to recommendations for pole attachment rates which were eventually adopted by the Seattle City Council by ordinance in 1995 as part of the overall City Light rate review.

76. The pole attachment rates established by Ordinance 117490 in 1995 were codified in SMC 21.49.065 and provided for rental rates of $14.66/pole/year for a pole owned solely by Seattle City Light, $7.33/pole/year for a pole jointly owned by Seattle City Light and US West, and $4.88/pole/year for a pole jointly owned by Seattle City Light, US West and Metro. Ordinance 117490 was the budget for all of Seattle City Light's electric rates. JH

77. The 1995 rate ordinance (Ordinance 117490) was regularly adopted.

78. The consideration of this ordinance was a public proceeding.

79. Although there was no special notice sent to Plaintiff, the consideration and adoption of the rate ordinance was not a secret proceeding.

80. TCI knew that the rates were going to be adopted by ordinance.

81. TCI also knew that its contract for pole attachment was coming to an end in April 1996.

82. TCI had at least one lobbyist, if not more, whose job it was to keep track of such legislation.

83. The Seattle City Council was not misled or incorrectly advised prior to the adoption of the 1995 rate ordinance.

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84. The City Council was advised that the proposed rates for pole attachment would be comparatively high, compared with pole attachment rates in other parts of Washington and in other parts of the United States.

85. The City Council also knew that the proposed rates were based on a policy of full return of costs.

86. The methodology which led to the rates adopted by ordinance in 1995 used and was based on accepted cost accounting methodology.

87. No council member testified that that they were misled or had made a mistake.

M. 1997 Rate Process

88. The amendment of pole attachment rates in 1997 took place in the context of three significant developments: (1) Congressional action; (2) the adoption of RCW 35.21.455; and (3) a major political lobbying effort by TCI.

89. In the first of these developments, Congress passed a new Telecommunications Act in 1996, in which the Senate/House Conference Committee backed off from a pure, per capita allocation of support space passed by the House of Representatives to adopt a per capita allocation of 2/3 of the support space which would gradually be phased in for communication attachments.

90. The adoption of a per capita allocation of only 2/3 rather than all of the support space was primarily a political compromise, and not based on cost accounting issues.

91. The adoption of RCW 35.21.455 was a significant development in the context of the 1997 pole attachment rate amendments because it gave utilities which rent space on poles a place to go to complain about the rates.

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92. The third significant difference between the 1995 and the 1997 rate process was the fact that TCI and some other cable providers mounted a major lobbying effort in the Seattle rate process.

93. TCI made it clear that it would go to court, if Seattle did not back off its rates.

94. In the process leading up to the adoption of new pole attachment rates by Seattle in 1997, TCI had full input at all stages of the process; TCI attended meetings and wrote a number of letters; and TCI brought its position that Seattle should follow the FCC rate fully to the attention of Seattle officials.

95. In the 1997 rate process, the Mayor's recommendation was basically the same methodology used in the 1995 rate process, but backed off to a per capita allocation of only 2/3 of the support space, together with a per capita allocation of 2/3 of the safety clearance space, rather than a per capita allocation of all the support and clearance space.

96. The decision to back off to a per capita allocation of 2/3 of the support and clearance space was due to political pressure and primarily in an unsuccessful effort to avoid litigation.

97. The decision to back off to a per capita allocation of 2/3 of the support and clearance space was not due to any doubts about the validity of the 1995 methodology or to any perceived flaws in the cost accounting rationale.

98. In 1997, the Seattle City Council again, as in 1995, enacted pole attachment rate through ordinance based on full and complete information.

99. Seattle received input from all sources, including TCI, and there was no factor in that input that was not considered in Seattle's adoption of pole attachment rates in 1997.

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100. Seattle revised its pole attachment rates by enactment of Ordinance 118540 in March 1997, amending the previous rates codified in SMC 21.49.065 to provide for new pole attachment rates in 1997 and for 1998.

101. The 1997 pole attachment rates established by Ordinance 118540 provided for rental rates of $12.85/pole/year for a pole owned solely by Seattle City Light, $6.42/pole/year for a pole jointly owned by Seattle City Light and one other owner, and $4.28/pole/year for a pole jointly owned by Seattle City Light and two other owners.

102. The 1998 pole attachment rates established by Ordinance 118540 provided for rental rates of $13.24/pole/year for a pole owned solely by Seattle City Light, $6.62/pole/year for a pole jointly owned by Seattle City Light and one other owner, and $4.41/pole/year for a pole jointly owned by Seattle City Light and two other owners.

N. Streetlights

103. Streetlights are located on many, but not all poles.

104. Streetlights are sometimes located in the 4-foot clearance space, but not always, depending on the easiest place to mount them.

105. Placement of the streetlights in the 4-foot clearance space is not necessary, nor does such placement preclude other attachments or rearrangements of the wires.

106. Whatever revenue might be attributable to having streetlights located on the poles would have had a very minor impact on the overall rate structure.

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O. Additional Space for Attachment

107. The way in which the typical pole is configured, it may appear that the pole has no more room for additional attachments on the pole, but the testimony in the case verifies that there is extra space on the poles for additional attachments.

108. The phone company does not usually use its full 2-feet of space.

109. Seattle City Light can reconfigure its electric wires, particularly by consolidating its secondary rack of three separate wires into a wrapped bundle, termed "triplex."

110. There is often space above the first cable attachment for another cable attachment.

111. In addition, cables can be lashed together, so that they are supported by a single support strand wire, utilizing a single attachment space on the pole.

P. Beneficial Aspects of Seattle Rate Methodology

112. There are several areas where in developing its rates, the City is "undercharging" in ways which benefit TCI and other entities which make attachments to Seattle City Light poles.

113. There is a two-year lag time in updating actual costs which go into the rate calculations.

114. Seattle counts the average number of entities making attachment to the poles for purposes of making per capita calculations as rounded to the number 3, whereas the actual average is 2.89.

115. Seattle charges itself a 33 percent reduction in pole costs for cross arm expenditures, (based on engineering estimates) whereas the default percentage used by the FCC is 15 percent, and the actual average for Seattle ~~appears to be closer~~ may be as little as 5 percent.

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116. Seattle charges half the single-owned pole rate for a pole jointly owned by US West, whereas US West is neither paying its full share of costs to Seattle City Light, nor charging its full cost to TCI.

Q. Effect of Pole Attachment Rates on TCI

117. The pole attachment rates under the 1995 ordinance reflected in the 1996 bill to TCI represented approximately $0.30 per subscriber, per month.

118. The pole attachment rates under the 1997 ordinance reflected in the 1997 bill to TCI represented approximately $0.24 per subscriber, per month.

119. The average subscriber payment per month to TCI is approximately $30.00 per month.

120. The pole attachment rates therefore represent less than 1% of TCI's subscriber income, even under the higher 1995 rates.

121. Subscriber income is not the only income to TCI from its cable operation, as it also receives additional revenue from programming and advertising.

122. The pole attachment rates passed in 1995, according to the FCC represented a 0.6% increase in TCI's costs.

123. No evidence was presented on the effect of the pole attachment rates on TCI's profits.

R. Non-payment of Pole Attachment Rental Rates

124. TCI has not paid any pole attachment rental fees to Seattle City Light under either the rates enacted in 1995 or the rates enacted in 1997.

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125. TCI did tender payment for the first four months of 1996, calculated under the 1988 pole attachment contract which did not expire until April 26, 1996, but that payment was returned by Seattle City Light, pending a resolution of the inventory of the number of poles to which TCI was attached. TCI offered to tender payment into court of the disputed amount which the court deemed unnecessary for purposes of quarantining assets for payment should TCI be unsuccessful in the litigation. N/A

126. Viacom paid the 1995 pole attachment rental rates for its 1996 cable attachments prior to the acquisition of Viacom by TCI later in 1996.

127. TCI has not paid Seattle City Light the 1997 pole attachment rental rate for either the area encompassed by former Viacom franchise area or the original TCI franchise area, nor has it paid for the remaining 8 months of 1996 for the original TCI franchise area under the rates enacted in 1995.

III. CONCLUSIONS OF LAW

A. Legal Standard

1. Pursuant to federal law, 47 U.S.C. § 224(c)(1), locally owned electric utilities are exempt from federal regulation of pole attachment rental rates.
2. RCW Chapter 80.54 provides for regulation of pole attachment rental rates for investor-owned utilities by the Washington Utilities and Transportation Commission, but does not give the WUTC rate making jurisdiction over locally-owned utilities.
3. Chapter 32 of the Laws of the State of Washington 1996 enacted a common legal standard for pole attachment rates which in separately codified sections of RCW apply to municipal electric utilities, public utility districts, and co-ops.
4. This 1996 Pole Attachment Act established the legal standard that pole rental rates must be "just, reasonable, nondiscriminatory and sufficient."

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5. The codified section of the 1996 Pole Attachment Act which applies to Seattle is RCW 35.21.455.

6. RCW 35.21.455(3) specifically provides that the statute does not bring municipal electric utilities under the jurisdiction of the Washington Utilities and Transportation Commission (WUTC) and specifically states the Legislature's intent not to do so.

7. RCW 35.21.455 does not require that Seattle use the same standards as are used by the WUTC for investor-owned utilities.

8. The Legislature did not define "just and reasonable" in RCW 35.21.455, but did define that term as applied to investor-owned utilities in RCW 80.54.040.

9. When there are two different legislative acts that differ in specifics, the differences are presumed to be intentional.

10. Accordingly, if the Legislature meant that there should be only one way to set pole attachment rates, it would presumably repeat the same formulation and not enact different language as it did in enacting RCW 35.21.455 in which the phrase "just and reasonable" was used without a specific definition.

11. In addition, there are significant differences between investor-owned utilities and municipally-owned utilities which justify different standards and more stringent controls over investor-owned utilities.

12. A municipality has as its ultimate responsibility the welfare of all of its constituents, of the public, including entities which attach to poles.

13. A city is presumed to have the economic interest and health of the city as a whole as one of its important goals, more so than a private utility.

14. A municipality does not operate a profit system and is less likely to be motivated by its own private interest at the expense of other elements of the public.

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15. In addition entities which attach to poles have a stronger political voice versus a municipality than is available to them versus an investor-owned utility, where they are much more at the mercy of the investor-owned utility.

16. The State also grants more deference to a governmental subdivision of the State, recognizing that there are public policy issues that may affect pole attachment rates, such as urban blight, which go beyond mere economics.

17. The intent of the Legislature in passing Chapter 32 of the Laws of the State of Washington 1996 was to meet a complaint made by entities which attach to poles that there was nowhere to go to ~~complain about the~~ review the reasonableness of pole attachment rates set by governmental subdivisions of the State which own poles.

18. The Legislature in passing Chapter 32 did not prescribe specific rate formulations, but rather provided a general standard of reasonableness and a recourse to court.

19. In addition, RCW 80.54.040 is not irreconcilably inconsistent with RCW 35.21.455(2).

20. Within the text of RCW 80.54.040 itself, it is not apparent that a pro rata allocation of the entire pole is mandated given that the phrase "in proportion" does not actually ~~modify "support and clearance space"~~ refer to "a share of the support and clearance space" within the sentence structure of the statute.

21. Even if a pro rata allocation of all space on the pole were found to be mandated by RCW 80.54.040 for investor-owned utilities, however, it is not inconsistent for two different regulatory systems to have different standards or different approaches.

22. The "just and reasonable" standard set forth in RCW 35.21.455 does not require adopting the standards of or the interpretation given to RCW 80.54.040.

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23. The term "reasonable" in the "just and reasonable" standard set forth in RCW 35.21.455(2) is a frequently adopted legislative standard which means not arbitrary or capricious; it means something for which a reason can be given, which doesn't mean the most or least favorable action for one party or another.

24. The term "just" in the "just and reasonable" standard set forth in RCW 35.21.455(2) means that, considering all of the circumstances, the court also has to consider an element of equity and must determine whether the rates are otherwise unfair or unjust, even if they are not arbitrary or capricious.

B. Application of Legal Standard to Seattle Rates

25. Neither the rates for pole attachment enacted by Seattle in 1995 nor in 1997 was arbitrary or capricious.

26. The pole attachment rates enacted by Seattle were based on articulated rationales after thorough study, and they were based on accepted cost accounting methodology.

27. The choice of per capita allocation of support and clearance space rather than a pro rata allocation is eminently reasonable; it is based on the rationale that each user uses and benefits from the support space equally.

28. The choice of per capita allocation for the support space is also based on an accepted cost accounting methodology which is applied in other situations where costs are allocated among different users.

29. There is no reasonable rationale why a profit making enterprise, such as TCI, should earn a profit by using the City's infrastructure without paying a full share of the costs.

30. The choice of a pro rata method of allocation could also be reasonable, in that arguments were made in support of it.

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31. The choice of a per capita allocation of the support space, however, is more rational, given that there is no relationship between what is attached above 20 feet on the pole and the necessity to have 20 feet of support space (and 7 feet of support space below the ground) to hold any attachment high enough off the ground.

32. The use of 20 feet support space between the ground and the first attachment, rather than an 18 foot support space urged by TCI, is appropriate, and allows for compliance with the Washington Administrative Code requirement for 18 feet of clearance at the lowest point of sag of the wires between poles.

33. Even though Seattle's choice of a per capita allocation methodology is more reasonable than the pro rata allocation methodology advanced by TCI, Seattle's choice of an allocation methodology only had to be reasonable.

34. Seattle's allocation of the 4-foot safety clearance space on a per capita basis is also reasonable.

35. It would, in fact, be reasonable to allocate all of the 4-foot safety clearance space to all attachments other than Seattle City Light, since it is primarily for the safety of the non electric attachments that the 4-foot safety clearance space exists.

36. Accordingly, it is certainly reasonable to allocate the 4-foot safety clearance space on a per capita basis, since none of the attachers would need that space if the others were not also on the pole.

37. In contrast it would be arbitrary to either assign all of the 4-foot safety clearance space to the electric utility or to allocate the 4-foot safety clearance space on a pro rata basis, since the primary purpose is to protect the safety of non-electric workers working on cable television or other communication lines.

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38. The presence of street lights in the 4-foot safety clearance space on some poles does not alter the reasonableness of Seattle's choice of a per capita allocation methodology for the 4-foot safety clearance space, in that streetlights are not on every pole, there is no space on the poles allocated to them, and whatever revenue credit streetlight attachments might have on the overall revenue to be allocated among attachers would have a very minor impact on the overall rate structure.

39. The issue of the City's reservation of space on the poles does not affect the reasonableness of the City's pole attachment rates.

40. The poles already appear occupied and the space being "reserved" is likely located in the space already occupied by Seattle City Light, and the "reservation" of the last space on the pole for City use is essentially notice of the City's intent to use part of its pole in the future, as this reservation does not affect on the current number of attachments on the poles.

41. Seattle's use of the number 3 to use as the average number of attachers in applying the per capita methodology is reasonable, given that the actual average is 2.89, and using a round number simplifies administration while at the same time benefiting the attachers which rent space on the poles.

42. Seattle's use of the FERC sub account 369.1 in determining maintenance costs as a percentage of assets rather than employing FERC account 369, which includes underground as well as overhead service assets, is a reasonable methodological choice based on an effort to make an "apples to apples" comparison.

43. In contrast, the Plaintiff's position that FERC account 369 must be used, without looking to specific sub accounts, is not rationally related to realities of Seattle's distribution system and would represent a slavish adherence to the FCC model.

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44. Seattle's use of an inflation factor to account for a lag time in assembling actual data is also reasonable.

45. The fact that Seattle moved to a per capita allocation of 2/3 of the support and safety clearance space in 1997 does not make the 1995 choice of full per capita allocation unreasonable.

46. The 1997 choice of methodology only demonstrates the City was bending to political pressures in 1996 and 1997, and does not detract from the underlying rationale of the full per capita allocation methodology employed by Seattle in enacting the 1995 rates.

47. The FCC methodology for setting pole attachment rental rates is not the measure of reason; it was the result of Congressional compromises and developed with the purpose and intent of helping a fledgling cable television industry, which is no longer a fledgling industry.

48. There is no showing that the cable television industry in Seattle is in need of any subsidy, nor is there any evidence from which it could be concluded that the pole attachment rates enacted by Seattle have had any dampening effect on competition.

49. Federal law specifically exempts local governments from FCC jurisdiction in setting pole attachment rates for the purpose of allowing local governments to experiment with different methodologies and with the freedom to meet their own needs.

50. The terms "reasonable" and "just" in RCW 35.21.455(2) also means that independent rate-making authorities are to use their own independent judgment based on reason and equity and not just follow what others are doing elsewhere in the country.

51. As a consequence, the Plaintiff's argument that the FCC model must be followed or that it necessarily reflects the best thinking on the subject must be rejected.

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52. There is no evidence that the rates Seattle enacted in either 1995 or in 1997 are unjust or otherwise inequitable.

53. Both TCI and Seattle receive equitable benefits from TCI's pole rental.

54. TCI benefits, because the expense of owning a portion of the poles or the expense of building its own set of poles is greater than the expense of renting space from Seattle.

55. Seattle benefits, because TCI's rent payments provide Seattle with some capital recovery.

56. There is not equitable reason why a profit-making venture providing a non-essential service should not share in the full cost of what is otherwise borne by either the taxpayer or by Seattle City Light ratepayers, especially when there is no showing that the pole attachment rate is anything other than a minor expense to TCI.

C. Pole Attachment Rental Owed by TCI

57. The inventory issue having been agreed upon between the parties, TCI owes Seattle City Light the $47,008.65 payment originally tendered by TCI to cover the four months of 1996 remaining under the 1998 pole attachment contract, without interest, since TCI had before tendered that amount.

58. For the remaining eight months of 1996, TCI owes Seattle City Light a total of $328,506.56, which is 2/3 of the bill for 1996 for the original TCI franchise area under the rates enacted in 1995, together with 17 months interest at 1% per month from October 17, 1996 (the same due date in 1996 as the bill sent to TCI for 1997 rental) through March 17, 1998.

59. For 1997, TCI owes Seattle City Light a total of $543,450, which is equal to the combined bill for the original TCI franchise area, plus the former Viacom franchise area, under rates adopted in the 1997

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ordinance, together with 5 months interest at 1% per month from October 17, 1997 through March 17, 1998.

D. Conclusion

60. The pole attachment rates enacted by Seattle in 1995 and 1997 are just and reasonable and in compliance with RCW 35.21.455(2).

61. TCI owes Seattle City Light unpaid pole attachment rent for the last four months under its 1988 pole attachment contract which expired at the end of April 1996, and for the remainder of 1996 plus all of 1997 under rates enacted by Seattle ordinance, together with intervening interest for unpaid rents due under Seattle's rate ordinances.

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III. JUDGMENT

Having entered the above Findings of Fact and Conclusions of Law, the Court hereby enters Judgment in favor of Defendant, City of Seattle, both with respect to Seattle's denial of Plaintiff's claims and with respect to its counterclaim against Plaintiff for unpaid pole attachment rent.

Plaintiff, TCI, is ordered to pay Seattle City Light a total of $918,966.00 for back rent, plus intervening interest, for pole attachment rental in 1996 and 1997.

Seattle, as the prevailing party, is awarded statutory attorneys fees of $125.00.

DONE IN OPEN COURT this 20th day of May, 1998

HON. J. KATHLEEN LEARNED, JUDGE

Presented by:
MARK H. SIDRAN
Seattle City Attorney

By: _____
William H. Patton, WSBA #5771
Assistant City Attorney
Attorneys for The City of Seattle

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EXHIBIT B

EXHIBIT A

Print Minute Orders 2/29/08 12:17 PM

Status: CLSD District Court, Denver County
Case #: 2005 CV 006972 Div/Room: 7 Type: Personal Injury
BLOOD, ANDREW et al VS QWEST SERV CORP et al

FILE DATE	EVENT/FILING/PROCEEDING
5/22/2007	Minute Order (print)

JUDGE: SAR CLERK: REPORTER:
JUDGE: SHEILA A. RAPPAPORT - RPTR (HIRED BY COUNSEL) KELLY MACKERETH
JTRL (DAY 7)
ALL PARTIES PRESENT
JURY INSTRUCTIONS READ - CLOSING ARGUMENTS ARE MADE - JURY RETIRES FOR DELIBERATIONS
ORD: JURY PANEL REUTRNS WITH THE FOLLOWING VERDICT: SPECIAL VERDICT FORM B - $21,667,600.00 IN FAVOR OF THE PLTF - PERCENTAGE CHARGED TO QWEST 100%
SPECIAL VERDICT FORM C: $18,000,000.00 IN FAVOR OF THE PLTF AND AGAINST THE DEFT QWESET
SPECIAL VERDICT FORM D: #1 ANSWER "NO"; #2 ANSWER "NO" - #3 ANSWER "YES" - #4 ANSWER "NO"
SPECIAL VERDICT FORM G: #'S 1, 2 AND 3 - ANSWERS "YES"
*JURY INSTRUCTIONS
*JURY VERDICT FORMS
*PLTF'S LIST OF WITNESSES
*JUROR QUESTIONS
*QWEST ORDER OF PROOF
*3RD PTY DEFT ORDER OF PROOF
*PLTFS' 2ND REVISED ORDER OF PROOF
*PLTF'S 4TH AMENDED LIST OF EXHIBITS
*DEFT'S EXHIBIT LIST
*3RD PTY AMENDED TRIAL EXHIBIT LIST
*INSTRUCTIONS TENDERED BUT NOT GIVEN (UNDER SEAL) /RMA

EXHIBIT A

GRANTED Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

Sheila A. Rappaport
Sheila A. Rappaport
District Court Judge
DATE OF ORDER INDICATED ON ATTACHMENT

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO Denver District Court 1437 Bannock Street Denver, CO 80202	
Plaintiff(s): ANDREW BLOOD and CARRIE BLOOD **Defendant(s): QWEST SERVICES CORPORATION and QWEST CORPORATION**	
Attorney or Party Without Attorney: Name: William L. Keating Michael O'B Keating Address: Fogel, Keating, Wagner, Polidori, and Shafner, P.C. Attorneys for Plaintiff 1290 Broadway, Suit3 600 Denver, CO 80203 Phone No.: (303) 534-0401 Fax No.: (303) 534-8333 Atty Reg. No.: William L. Keating #3867 Michael O'B Keating #33002	Case Number: 2005 CV 6972 Ctrm: 7
ORDER RE: MOTION TO INCREASE EXEMPLARY DAMAGES AWARD	

THIS COURT having reviewed Plaintiffs Motion to Increase Exemplary Damages Award and being fully advised in the premises, does hereby:

ORDERS that Plaintiffs' Motion is granted.

DONE this ____ day of _____, 2007.

BY THE COURT:

_____
District Court Judge

EXHIBIT A

This document constitutes a ruling of the court and should be treated as such.

Court:	CO Denver County District Court 2nd JD
Judge:	Sheila Ann Rappaport
File & Serve Transaction ID:	15192827
Current Date:	Sep 04, 2007
Case Number:	2005CV6972
Case Name:	BLOOD, ANDREW et al vs. QWEST SERV CORP et al

Court Authorizer Comments:

The Court has reviewed the testimony presented at trial as well as the briefs submitted by Counsel and determines that the evidence is consistent and overwhelming that the Defendant continued the behavior or repeated the action which is the subject of this litigation (failure to inspect, maintain, and repair its poles) during the pendency of this case and that such behavior posed a substantial risk of harm to the Plaintiffs or another person or persons. The magnitude of the potential harm to others during the pendency of the case justifies the increase of exemplary damages to an amount equal to three times the actual damages awarded by the jury in this case, pursuant to C.R.S. 13-21-102(3)(a).

/s/ Judge Sheila Ann Rappaport

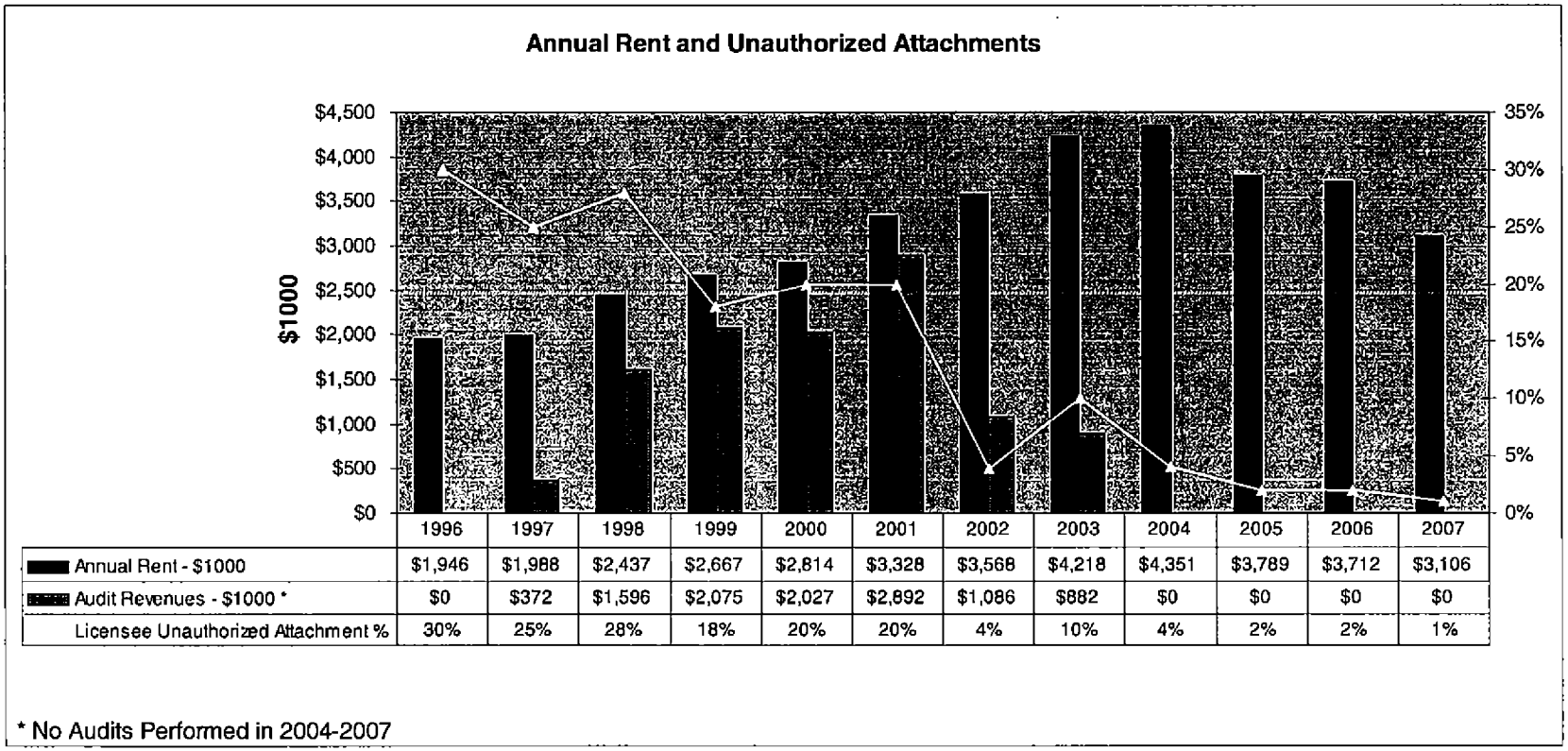
EXHIBIT C

UTC 2008 Pole Attachment Meeting
Jan 14-15 Washington, DC
Case Study: Unauthorized Attachments and Code Compliance

- John Sullivan, General Manager
  Utility Asset Management
  Portland General Electric Company
  John.Sullivan@pgn.com
  503-672-5569
- Karla Wenzel, Contracts Manager & Business Support
  Utility Asset Management
  Portland General Electric Company
  Karla.Wenzel@pgn.com
  503-672-5571

Utility Asset Management's Internal Business Case

Rent and Audit Revenue Over Time and Impact on Compliance



	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Annual Rent - $1000	$1,946	$1,988	$2,437	$2,667	$2,814	$3,328	$3,568	$4,218	$4,351	$3,789	$3,712	$3,106
Audit Revenues - $1000 *	$0	$372	$1,596	$2,075	$2,027	$2,892	$1,086	$882	$0	$0	$0	$0
Licensee Unauthorized Attachment %	30%	25%	28%	18%	20%	20%	4%	10%	4%	2%	2%	1%

* No Audits Performed in 2004-2007

EXHIBIT D

EXHIBIT A

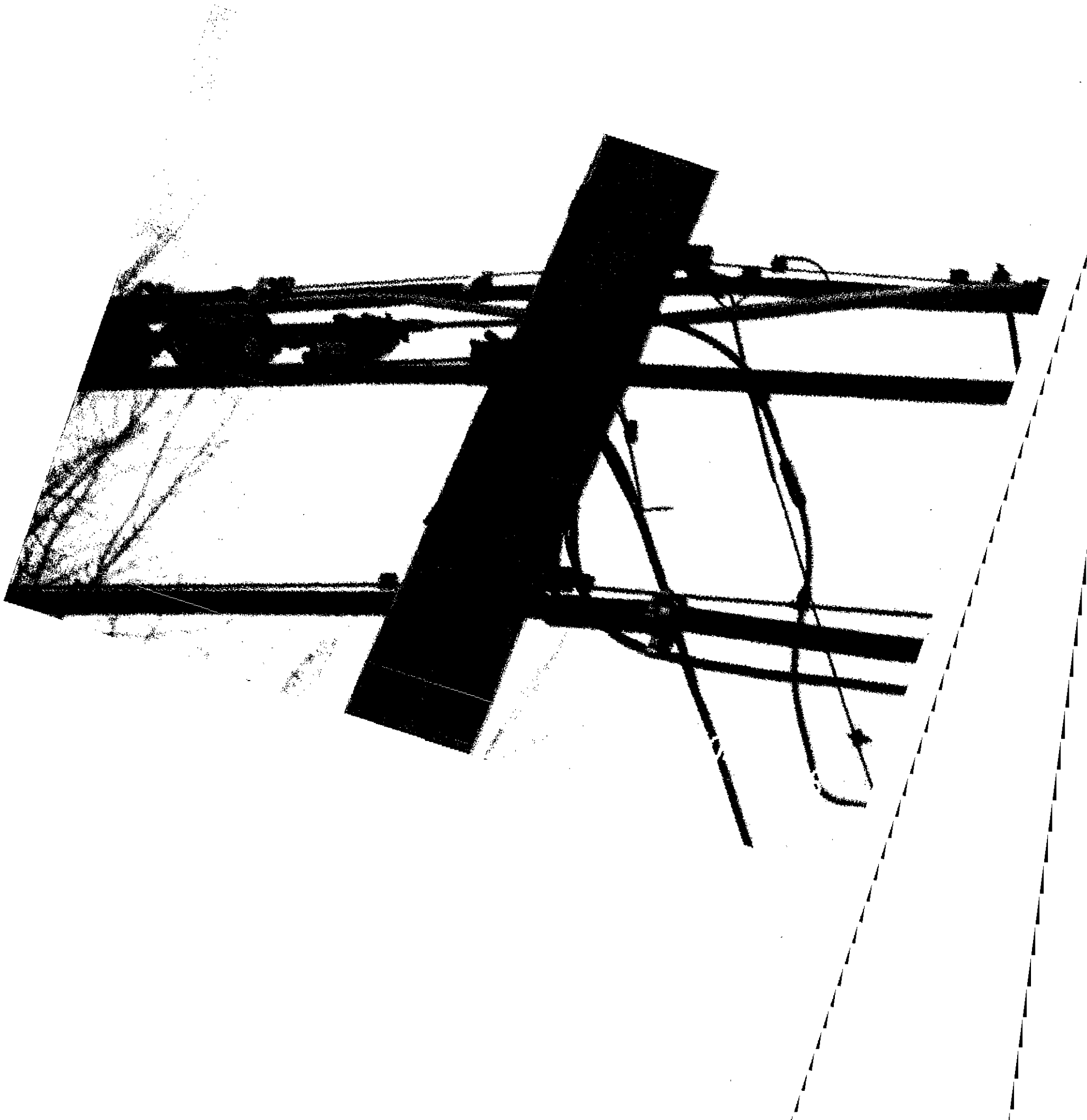


EXHIBIT A

EXHIBIT A

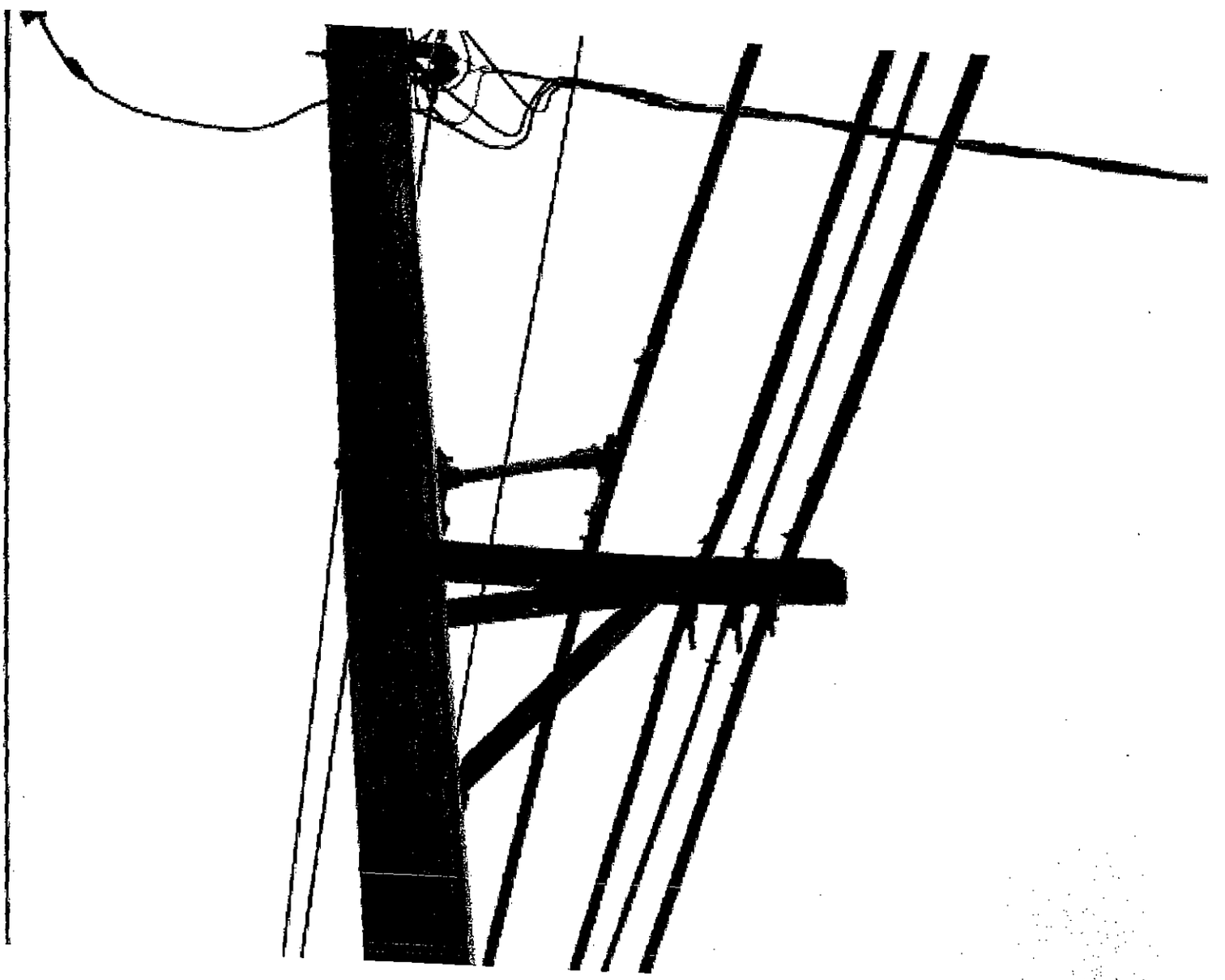


EXHIBIT A